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Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary June 27, 2002 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge John Schultheis, Judge Michael Cooper, Judge Richard Hicks, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Representative Kelli Linville, Senator Jim Honeyford, Senator Karen Fraser, Keith Phillips (Department of Ecology Water Policy Specialist); Judge Linda Krese participated by telephone; Representative Bruce Chandler was not present.

### ***Others in Attendance:***

From the Attorney General's Office (AGO): Rob Costello, Mary Sue Wilson, Alan Reichman, Bonnie Czepiel, Tammy Teeter.

### ***Legislative Staff:***

Tom Davis, Caroleen Dineen, Ken Hurst, Genevieve Pisarski, John Stuhlmiller, Karen Terwilleger, Gary Wilburn.

### ***Others:***

Dawn Vyvyan (representing the Yakama Nation), Mike Schwisow (representing the Washington State Water Resources Association).

*The meeting was called to order at approximately 1:00 p.m.*

### ***Introductions***

Attorney General Gregoire welcomed the Task Force and invited members to introduce themselves and describe their experience on water issues. Attorney General Gregoire explained that she and her staff had compiled a set of materials that she believed would be useful for the Task Force. She explained that her description of items such as the types of disputes to be examined by the Task Force and the schedule for Task Force meetings were offered to begin discussion and she welcomed suggestions for alternative approaches. Because Representative Chandler was unable to attend, Assistant Attorney General Mary Sue Wilson spoke with him in advance of the meeting. During the Task Force discussion, Mary Sue conveyed Representative Chandler's perspective on several of the agenda topics.

### ***"The Mission of the Task Force"***

Attorney General Gregoire noted that the Legislature and various other policy groups have attempted to tackle water issues for many years, repeatedly grappling with questions involving both policy and structure. She suggested that the Task Force focus on structure while

others work on issues of policy. She presented the following proposed Problem Statement to guide the efforts of the Task Force:

Develop a report to the Legislature that includes options and recommendations for a new water dispute resolution process that is fair and efficient and is less costly and time consuming for participants.

There was general consensus that this statement was a good representation of the mission of the Task Force.

### ***Initial Identification of Criteria for Assessing Strengths of a New System***

Next, the Task Force began identifying criteria that should be used to assess the advantages and disadvantages of alternative systems. The following criteria were suggested:

- Cost: for both participants and the public
- Unified system (which covers all types of water, *e.g.*, ground water, surface water, rain water)
- Recognizes limitations of interests and authorities of other jurisdictions (*e.g.*, other states, tribes, federal government claims)
- Appropriately comprehensive
- Provides access to all, especially pro se parties
- Timely & efficient
- Just & balanced
- Certainty about its scope (*e.g.*, does it cover interstate issues or not?)

It is expected that the Task Force will continue to discuss this topic and this list will be revised accordingly.

### ***Parallel Efforts***

Mary Sue explained that the 2002 Legislature directed a number of water study efforts. She provided a handout showing five activities: (1) the Water Disputes Task Force; (2) Tribal and federal water rights; (3) Streamlining adjudications; (4) Transboundary water rights; and (5) Water rights records administration.

Mary Sue then summarized the AGO's effort on the tribal and federal water rights report. This report is due to the Legislature by October 1, 2002. The report will examine and characterize the types of issues involved with federal and Indian reserved rights and how other states address these issues (*e.g.*, through litigation, settlement, or other innovative approaches). The AGO will conduct a survey of other western states to identify the approaches used elsewhere and the advantages and shortcomings of such approaches. The Solicitor General's Unit of the AGO will draft a report and circulate it for review to local law professors later this summer. The AGO has already received materials on this topic from a variety of sources, including from the Chehalis Tribe and from the Navy. The Department of Interior has assigned a contact for the AGO for this effort.

Next, Task Force Member Keith Phillips explained the status of Ecology's efforts on the other legislatively-directed reports. Ecology will submit a report to the Legislature on streamlining adjudications in December 2002, a report on transboundary water rights in January 2003, and a report on water rights records administration in October 2002.

Copies of the reports that are generated pursuant to each of these efforts will be provided to Task Force members. Authors of the reports will be asked to make presentations to the Task Force at the January 2003 meeting.

There was discussion about whether the reports were intended to inform the Legislature or the Task Force. Senator Fraser explained that each study was designed to be a separate, stand-alone document that informed the Legislature. She acknowledged that others (including this Task Force) would certainly review the reports. Attorney General Gregoire asked whether the 2003 Legislature was expected to pursue legislation in response to the reports, specifically the Streamlining Adjudications Report. Representative Linville indicated she thought the 2003 Legislature might make minor changes to the system in response to the report. Senator Fraser suggested that if it looks like the Task Force should be looking at the report, the Legislature might decline to act on the topic in 2003, but it would probably depend on whether the issue was ready for action and whether it had broad support.

Next, Keith Phillips provided background information on water legislation passed in 2001 and 2002. He provided members with a handout summarizing these new laws. He also provided a copy of an August 20, 2001 letter (signed by 11 Washington officials, including the 4 legislators who serve on this Task Force) identifying 4 specific topics that continue to be the focus of water policy efforts. These topics are: (1) instream flows, (2) water for growing communities, (3) use it or lose it policies, and (4) funding for water infrastructure, including storage and drinking water systems.

### ***Washington's Current System***

Assistant Attorney General Alan Reichman provided a presentation to the Task Force of Washington's administrative-judicial hybrid system of water rights dispute resolution. An outline of Alan's presentation is attached to this meeting summary. The presentation also made reference to background materials in the Task Force notebook, located at Tabs 6, 7, & 8A.

Questions, answers and discussion followed the presentation. One of the questions resulted in a discussion of the possibility that a judicial or quasi-judicial officer Task Force member might have to recuse himself or herself from participation in a case if he or she commented during Task Force discussions on the specifics of a pending matter. To avoid this possibility, Attorney General Gregoire emphasized that she saw no reason for the group to discuss the specifics of pending cases. She also urged the judicial and quasi-judicial officers to expressly state their concerns should Task Force discussions move in the direction of an active case.

### ***Report from Staff***

Mary Sue reported that she had been working with AGO law clerk Bonnie Czepiel, Ken Slattery from Ecology, and legislative staff to compile background information for the Task Force.

An initial set of background material was provided in the Task Force binder (Tabs 6-10). Mary Sue distributed two handouts. The first is a 6-27-02 List of Background Readings. All the materials on this list are available to Task Force members. Members should call or email Mary Sue to obtain copies of any of the items on this list. A revised version of this list will be distributed to the Task Force later this summer. Mary Sue also handed out a list of website resources that may be useful to Task Force members.

Mary Sue described the research effort to date. Staff undertook electronic searches of various databases such as WESTLAW to identify helpful law review articles and other publications. Staff also visited a number of websites for law schools and other organizations involved in water rights issues. Staff have contacted or are in the process of contacting the following organizations to obtain relevant background information: Western States Water Council; Dividing the Waters.org; Conference of Western Attorneys General; Council of State Governments (CSG); National Conference of State Legislatures (NCSL). Legislative staff gathered materials from old legislative files reflecting previous legislative efforts on adjudications and other related topics.

Mary Sue invited members to identify specific materials they are interested in obtaining. She also urged members to suggest other areas for staff research.

Staff will develop and conduct a survey of other western states to identify the methods used elsewhere for resolving water rights disputes and the strengths and weaknesses of these methods. The results of this survey will be reported at the October 2002 Task Force meeting.

Attorney General Gregoire will attend a meeting of the Conference of Western Attorneys General (CWAG) in late July. She will ask other Attorneys General for information and contacts on water disputes.

### ***Discussion of the Scope of the Task Force Effort***

The Task Force reviewed the Strategy Statement (Tab 4 in materials) and examples of pending cases involving water disputes (Tab 7). Members began to identify categories of disputes that will be considered as the focus of the Task Force. Some categories of disputes are described at page 2 of the Strategy Statement. Set forth below is an initial list and descriptions of the types of disputes the Task Force may examine.

#### ***Initial Identification of Disputes the Task Force May Examine:***

- (1) Two-party disputes (or private, small-scale disputes): disputes between individuals concerning the validity, seniority, and/or quantity of their rights; may also include disputes regarding the potential impairment by one water user of another water user's right.

- (2) Historic claims disputes: disputes involving a claimant who does not hold a permit or certificate, but whose claim pre-dates adoption of the water code and is filed in the claims registry.
- (3) Instream flow disputes: disputes may involve determining whether a particular water right is subject to an instream flow or how established flows can be met.
- (4) Federal and Indian reserved rights disputes: disputes concerning the existence, validity, and/or scope of federal or Indian reserved rights.
- (5) Water rights management disputes: includes disputes involving Ecology decisions to approve or deny applications for new water rights or applications to change water rights and disputes involving Ecology notices of relinquishment.
- (6) Water rights enforcement disputes: in watersheds that have not been adjudicated, includes disputes involving enforcement of terms of water right permits or conditions (e.g., cancellation of permit if water use not developed according to condition in permit); in addition, in watersheds that have been adjudicated, includes disputes involving enforcement of terms of court's final decree.

The Task Force discussed whether to address interstate issues. The Task Force made a tentative decision to proceed to address in-state issues only. This decision may be revisited after members review Ecology's transboundary report (due out in January 2003).

### ***Discussion of the Schedule and Frequency of Meetings***

The Task Force agreed to meet in October 2002, January 2003, March 2003, May 2003, July 2003, and September 2003. At the next meeting (October 15, 2002), the Task Force will schedule meetings for the remainder of 2003.

The meeting schedule is:

**Tuesday, October 15, 2002, 1:00 p.m. to 4:00 p.m. in Olympia**

**Wednesday, January 8, 2003, 1:00 p.m. to 4:00 p.m. in Olympia**

**Monday, March 24, 2003 or Tuesday, March 25, 2003, in Olympia**

**Thursday, May 22, 2003, 1:00 p.m. to 4:00 p.m. in Yakima**

**July 2003 (date to be selected at October 2002 meeting)**

**September 2003 (date to be selected at October 2002 meeting)**

### ***Initial Identification of Possible Presenters to the Task Force***

The Task Force hopes to bring a speaker or speakers with experience in other methods of water dispute resolution to the October 2002 meeting.

Several members stated an interest in hearing from a person with experience in dispute resolution alternatives. Others suggested an interest in hearing from a water master or a special master. Representative Linville clarified that she was interested in hearing from a water master who had responsibility for resolving and enforcing water disputes in advance of any court process.

Following is a list of suggested speakers (this list includes suggestions provided by Commissioner Ottem following the meeting):

- **John E. Thorson** is an attorney and water policy consultant. He is a former special master in the Arizona General Stream Adjudication, where he acted as the chief judicial hearing officer in both the Gila River and Little River adjudications. He has served as regional counsel for the Western Governors' Conference; director of the Conference of Western Attorneys General; consultant to the Montana state government; and director of the Missouri River Management Project for the Northern Lights Institute.
- **Justice Gregory Hobbs** of the Colorado Supreme Court has served on the Colorado Supreme Court since 1996. He practiced law for 25 years, with an emphasis on water, environment, land use, and transportation. He has served as an adjunct professor of Environmental Law in the Masters Program in Environmental Policy and Management, at the University of Denver. He is a former member of the Governor's Water Roundtable.
- **Judge Bruce Loble** has served as the Chief Water Judge of the Montana Water Court for the last 11 years. He has reviewed over 14,000 state law based claims and five compacts involving federal and Indian reserved water rights. He frequently lectures on water right related matters.
- **Susan Cottingham** is the Program Manager of Montana's Department of Natural Resources and Conservation. She has 20 years experience in working on issues involving the Montana compact commission.
- **Judge Michael Nelson** serves as a Superior Court Judge for Apache County in Arizona. He has acted as a settlement judge in both the Little Colorado River and Gila River Adjudications. He has dealt with federal reserved rights.
- **Retired Judge Daniel Hurlbutt, Jr.** presided over Idaho's Snake River Basin Adjudication (SRBA) throughout the 1990's. The SRBA is the largest single lawsuit in Idaho history and involves more than 160,000 water rights.
- **Professor A. Dan Tarlock** is a Professor of Law and Co-Director of the Program in Environmental and Energy Law at the Chicago-Kent College of Law. Professor Tarlock is a recognized expert in environmental law. He has published a treatise, *Law of Water Rights and Resources* and is a co-author of four casebooks, *Water*

*Resource Management, Environmental Law, Land Use Controls, and Environmental Protection: Law and Policy.*

- **Judge Gary P. Hartman** serves as a judge in the Fifth Judicial District in Wyoming. He has presided over the Big Horn River case, which will establish priority for use of all waters in the Wind and Big Horn rivers and their tributaries. The Big Horn case dates to 1977.
- **A. Reed Marbut** is the Federal and Indian Water Right Coordinator for the Oregon Water Resources Department. He is the team leader/facilitator for the Klamath Basin Alternative Dispute Resolution Program.
- **Ramsey Kropf** is an attorney who has practiced water law in Arizona, Wyoming, and Colorado. He served as Special Master in the Big Horn River Adjudication in Wyoming. He served as an attorney and case administrator for Arizona's General Stream Adjudications from 1992 to 1994.

Additional suggestions for speakers should be provided to Mary Sue by July 31, 2002. Thereafter, staff will informally interview the persons identified and determine who to invite based upon their experience and their ability to address issues in which the Task Force is interested.

***Public Involvement***

The Task Force decided that the primary opportunity for public involvement on water disputes issues will be during the legislative process following completion of the final report of the Task Force. People who want to submit materials or comments for the Task Force's consideration will be asked to submit comments in writing and direct them to Mary Sue. Mary Sue will then distribute the materials to members.

Keith Phillips and Mary Sue frequently attend monthly meetings of the Water Resources Advisory Committee (WRAC), a group organized by Ecology and made up of persons and groups interested in water rights issues. Keith suggested that he and/or Mary Sue could provide periodic reports on the status of the Task Force effort at WRAC meetings. The Task Force concurred.

The Task Force decided that meeting summaries should be available to the public upon request and should also be posted on an appropriate website.

*The meeting adjourned at approximately 4:00 p.m.*





Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary October 15, 2002 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Michael Cooper, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Representative Bruce Chandler, Representative Kelli Linville, Senator Karen Fraser, Senator Jim Honeyford, Keith Phillips (Department of Ecology Water Policy Specialist); Judge John Schultheis was not present.

### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, Alan Reichman, Steve North, Tammy Teeter.

*Legislative Staff:* Tom Davis, Caroleen Dineen, Ken Hurst, Genevieve Pisarski, John Stuhlmiller, Karen Terwilleger, Gary Wilburn.

*Others:* Dawn Vyvyan (representing the Yakama Nation), Kathleen Collins, Jon Hare (Chehalis Tribe), Stella Satter (Department of Ecology), and Fred Rajala (Department of Ecology).

*The meeting was called to order at approximately 1:15 p.m.*

### ***Introductions***

Attorney General Gregoire welcomed the Task Force and the two guest speakers and invited Task Force members and audience members to introduce themselves.

### ***Updates on Reports***

Attorney General Gregoire reported that the AGO Report on the topic of federal and Indian reserved water rights was out for review by area law professors. Keith Phillips reported on the status of two other reports, the joint Ecology/AGO report on Streamlining Adjudications, scheduled to be completed by December 1, 2002, and Ecology's report on negotiations involving transboundary water right issues, scheduled to be completed by January 1, 2003. Copies of these reports will be distributed to members before the next Task Force meeting.

### ***Presentation by, and Discussion with, Justice Hobbs***

Attorney General Gregoire welcomed the first guest speaker, Colorado Supreme Court Justice Gregory Hobbs, with a special poem. Justice Hobbs was invited to describe Colorado's system of statewide water courts, including associated costs, frequent criticisms, particular advantages, and thoughts regarding the possibility of adopting a similar water court system elsewhere.

Prior to the Task Force meeting, Justice Hobbs provided each member by email: (1) responses to questions submitted to him in advance of the meeting, (2) Colorado statutes, (3) the *Empire Lodge* Colorado Supreme Court decision, and (4) a spread sheet showing Colorado water court costs. At the meeting, Justice Hobbs provided three handouts: (1) *Streamflow Information and Drought Impacts*, (2) *Colorado Division of Water Resources*, and (3) an additional copy of the water courts cost spread sheet. After the meeting, Justice Hobbs provided two additional handouts: (1) a one page document entitled: *What Exactly is a River Call?* and (2) a law review article entitled *Developing a Water Supply in Colorado: The Role of An Engineer*.

Justice Hobbs described the Colorado system in general and identified several specific elements. The state is divided into seven water divisions. A map of these divisions is included on page 5 of his *Streamflow Information and Drought Impacts* handout. A water judge and an alternate water judge are appointed for each of these divisions. The alternate judge may serve as a settlement judge on certain cases.

Justice Hobbs made the following observations:

- Colorado's water court system is not a full-scale adjudication in the traditional sense. Rather it involves case-by-case processing, generally driven by water right transactions. For example, changes and transfers to water rights require approval of the water court and they are what frequently drive water court activity.
- Water courts do not create rights, they identify what rights exist.
- Colorado's state engineer serves the very important roles of administrator and enforcer. The engineer also encourages water users to make deals with each other (voluntarily allocate limited water) to avoid enforcement.
- Only holders of "decreed rights" can make calls for enforcement. If you do not hold a "decreed right," your water use can be shut off.
- 95% of the work of the water courts is done at the referee level, where uncontested decrees are issued in response to requests to change water rights.
- The concept of augmentation plans has been developed as a way for junior water right holders to avoid getting shut off in times of water shortages. The junior right holders acquire credits by augmenting the system in the off-season. By augmenting the system in the off-season, juniors are less likely to be curtailed in times of shortage.
- The total annual cost of the water court system for FY 2003 is \$1.08 million. This covers the judge, magistrate, and clerk costs. In terms of time spent, the total judge need across all 7 divisions is 0.35 (a little more than 1/3 of one judge's time); the total magistrate need is 3.23; and the total court staff need is 18.45. (See cost spreadsheet handout for additional details.) The revenue for the water courts comes from general legislative appropriations and a minimal filing fee. The filing fee per water transaction is approximately \$150.00.
- Colorado's water court experiences a very low rate of contested hearings. For example, in one of the seven divisions (division 6), there have been no contested hearings for ten years. This explains the small amount of time the judges devote to the water courts (previous bullet).

- Instream flows are established when the Water Conservation Board obtains an instream flow appropriation from the court.

***Presentation by Staff Regarding Water Rights Dispute Systems in Six Other States***

AGO and legislative staff conducted surveys of six western states, asking officials from each state the same set of questions. Results of the surveys were distributed at the meeting. Highlights regarding the states' responses included:

In **Oregon**, adjudications do not include post-1909 state permitted rights, meaning the scope of the adjudication is more limited than in Washington. Recent legislative actions have included appropriations of \$1 million to address permit backlogs and the establishment of timelines for permit processing. Adoption of a \$200 protest fee appears to be responsible for a dramatic reduction in the numbers and types of protests filed.

In **Idaho**, the Snake River Basin Adjudication (SRBA) began in 1987, involves about 160,000 state-law based claims as well as other rights and covers 85 percent of Idaho's land mass. Idaho's Department of Water Resources processes water right permit applications. Currently, administrative moratoria on permit processing are in place while two significant categories of issues are addressed in the SRBA. The issue of hydraulic continuity between the river and a very large aquifer is being mediated. Issues involving the Endangered Species Act (ESA) and federal reserved water rights are also being mediated. When Idaho's system was created, Idaho officials deferred to the federal government's position that federal rights could only be adjudicated through a judicially-based system. Oregon's experience has proven that an administratively-based system can also satisfy the McCarran Amendment and Idaho believes and administrative system may have proven more effective. The advantage of a judicially-based system is that the funding is likely to more constant, whereas the funding of an administrative system is more easily subject to legislative cuts.

In **Arizona**, separate legal regimes govern the use of surface water and groundwater. Surface water rights are adjudicated in court proceedings, in which Arizona's Department of Water Resources serves in a neutral technical, support capacity. The Gila River (begun 1979) and Little Colorado River (begun 1981) adjudications are underway. The geographic area of these adjudications covers three quarters of the state. In these proceedings, there is substantial federal and Indian land to deal with and Arizona has attempted to settle those claims before reaching private claims. Groundwater is regulated under the 1980 Groundwater Management Code, which involves the administrative management of Active Management Areas (AMAs). Even though much of the regulated groundwater serves 80% of the state's population and is subject to overdraft, the groundwater management system enjoys the general support or "buy in" of the major interests.

In **California**, separate legal regimes govern surface water and groundwater use. Although general adjudication of stream systems is provided for by statute, there has been a trend away from general adjudications and toward individual actions on specific claims. The fact that California has not generally embarked on stream adjudications may be attributable to the fact that most large water users in the state receive their water from state and federal water projects. California's system is criticized for the lack of integration between surface water and

groundwater. It is praised for the public's access to the State Water Resources Control Board's decisions and the Board's integration of water quantity and quality issues.

In **Montana**, a water right permit system is administered by the Department of Natural Resources and Conservation. A state-wide adjudication is underway in Montana's water court, which was created in 1979 and is divided into four districts and presided over by a chief water judge assisted by four water masters. 220,000 claims have been filed in this proceeding, 16,000 of which have final decrees, 22,000 have preliminary decrees, and 84,000 have temporary preliminary decrees. The Department is not an advocate in the adjudication, but supplies data and acts as a reviewer of facts. Montana's system is criticized for the slow pace of its adjudication (only one water judge results in delays in rulings). It is praised for the quality of historical data maintained by the Department.

For **Colorado** highlights, refer to Justice Hobbs' remarks (above).

### ***Presentation and Discussion with Special Master Ramsey Kropf***

Attorney General Gregoire introduced the second guest speaker, Ms. Ramsey Kropf. Ms. Kropf practices water law in Colorado and Arizona and also serves as Special Master in Wyoming's Big Horn River Adjudication. She has chaired a number of CLEs and other conferences focusing on general stream adjudications. She has spoken to a number of groups including New Mexico's General Assembly on the topic of what works and what doesn't work in general stream adjudications.

Ms. Kropf was asked to address the following topics: her experience as a special master in the Wyoming general adjudication; the challenges she has observed as other western states have reformed their water rights systems; and her general ideas on what works and what doesn't work in general stream adjudications. Following her remarks, Ms. Kropf distributed copies of her power point presentation.

Ms. Kropf began her discussion describing the Big Horn River adjudication. It began in 1977 and she is the fifth special master to serve in the adjudication. She has held this position since 1995. Wyoming's general adjudication statute is one paragraph long and does not define the process for the adjudication. Therefore, the court has developed the process over time. At the outset, the Big Horn case was divided into three phases, (1) Indian reserved rights; (2) non-Indian federal reserved rights; and (3) state-based rights. Over the course of the proceeding, 6 appeals have gone to the state supreme court, all dealing with some aspect of Indian water law. The protracted and acrimonious nature of the Big Horn litigation gave rise to more incentive to pursue settlements. Ms. Kropf noted that the overlay of a court proceeding like an adjudication is helpful in facilitating settlement by establishing deadlines and imposing other process.

Next, Ms. Kropf noted Arizona's experience when the state overhauled its water code. After five years of litigation regarding the legislative changes, 22 of 33 statutory changes were invalidated as unconstitutional. In discussing Arizona's water right issues, Ms. Kropf noted the parallels between Arizona and Washington, including a similar number of tribes in the two states (26 recognized tribes in Arizona, 27 in Washington).

Ms. Kropf concluded her comments by discussing the following 10 observations about what does and doesn't work in general stream adjudications:

- (1) Separate Federal and Indian Claims from State Claims: Federal and tribal rights should go first.
- (2) The KISS principle (Keep it Simple Stupid):
- (3) Foster a Dispute Resolution Process: Give it specific deadlines and consequences; evaluate whether local models (like watershed councils) can be used; capitalize on current focus on consensus models. Dispute resolution process can also work in tandem with litigation.
- (4) Remove Ambiguity Regarding the State's Role: Don't be ambiguous; Designating the state as a party, not a neutral, enables the state to exercise leadership in helping to keep the process moving forward.
- (5) Put State Based Rights on Back Burner: This will simplify the proceedings.
- (6) Don't complicate the statutory set-up; simple is better. Complex structure increases cost and decreases flexibility.
- (7) Carefully evaluate the option of interlocutory appeals. Several states provide for direct review to State Supreme Court. This can speed process up by providing quick answers to preliminary questions (in Idaho, the Supreme Court must decide appeals within 3-4 months). It can also slow the process down (in Arizona, review of 6 pretrial decisions have been pending for a long time).
- (8) Minimize resource allocation. Address hot spot issues early. This may facilitate quicker resolution later. Use Internet and other technology for sharing of information and facilitating participation.
- (9) Don't fight over forum. 20 year forum fight in Oregon. Fear of bias in either state or federal court does not appear well-founded.
- (10) Always look for the possibility to craft a settlement of federal reserved water rights.

Attorney General Gregoire asked Ms. Kropf if she was familiar with the United States' recent pronouncement that the federal government would claim much less water in disputes involving federal (non-Indian) reservations. Ms. Kropf indicated the recent pronouncement involved the Gunnison National Forest in Colorado. Attorney General Gregoire asked that the federal government be contacted to determine whether this was a new federal water rights policy statement.

***Next Meeting (January 8, 2003)***

Task Force members discussed the agenda for the next meeting (scheduled for January 8, 2003 in Olympia, from 1:00 p.m. to 4:00 p.m.). It was suggested that Susan Cottingham, staff director of Montana's Compact Commission, be invited to speak to the Task Force. It was also suggested that Colorado's State Engineer be invited to speak to the Task Force, in either January or March. Also on the January 2003 agenda are presentations regarding the Reserved Rights Report, Streamlining Adjudications Report, and Transboundary Water Rights Report.

A request was made that data be compiled documenting the number of cases, an estimate of the state's current staff allocations, and an estimate of expenditures associated with water rights disputes. It was requested that the data include: PCHB water rights cases and subsequent appeals; Ecology water rights decisions; adjudications; other court actions involving water right issues; and watershed planning efforts. Staff will work on gathering this type of data for the March 2003 meeting.

It was suggested that the Task Force begin discussions regarding the scope of its efforts by determining whether it intends to design a system or systems aimed at resolving all categories of water rights "disputes," or whether a system would be designed to address only a subset of disputes. A discussion of this topic is expected to occur at either the January or March 2003 meeting.

It was suggested that staff work on a "white paper" describing several possible models to be considered by the Task Force in March 2003.

The January meeting will include a presentation by Susan Cottingham, presentations regarding the recently-completed reports, an update regarding the federal government's recently announced position regarding reserved water rights, and a summary of data if data gathering is completed by then.

*The meeting adjourned at approximately 4:10 p.m.*



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary January 8, 2003 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Michael Cooper, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Judge John Schultheis, Pollution Control Hearings Board Member Kaleen Cottingham, Representative Bruce Chandler, Representative Kelli Linville, Senator Karen Fraser, Senator Jim Honeyford, Tom Laurie as substitute for Keith Phillips on behalf of the Department of Ecology.

### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, James Pharris, Barbara Markham, Tammy Teeter.

*Legislative Staff:* John Charba, Caroleen Dineen, Ken Hirst, Evan Sheffels, John Stuhlmiller, Karen Terwilleger, Sam Thompson, Gary Wilburn.

*Others:* Guest speakers: Montana Reserved Rights Compact Commission Staff Director Susan Cottingham and Professor Robert Anderson, University of Washington School of Law.

*The meeting was called to order at approximately 1:15 p.m.*

### ***Introductions***

Attorney General Gregoire welcomed the Task Force and the two guest speakers and invited Task Force members and audience members to introduce themselves.

### ***Presentation on AGO Reserved Rights Report***

Senior Assistant Attorney General James Pharris provided an overview of the AGO *Federal and Indian Reserved Water Rights Report to the Legislature*. Copies of this report were distributed to members in early November. Senator Fraser praised the Attorney General's Office for presenting the report in a very readable, user-friendly format. Attorney General Gregoire also added that Tom McDonald, Bob Anderson, and Amy K. Kelley contributed to the report.

### ***Presentation on Department of Ecology/AGO Streamlining Adjudications Report***

Assistant Attorney General Barbara Markham provided an overview of the Department of Ecology/AGO *Streamlining the Water Rights General Adjudications Procedures Report to the Legislature*. Electronic copies of this report were distributed to members in advance of the meeting. Hard copies were provided at the beginning of the meeting. Following the discussion of the report, Ecology was asked to prepare fiscal note type estimates of the recommendations.

AAG Markham focused her remarks on the nine recommendations included in the report. One member asked whether the result of certain recommendations would reduce work or instead shift work currently performed by the court to another entity such as Ecology or the PCHB. Ms. Markham explained that with respect to recommendation #1 (within the adjudication process, have Ecology make the tentative determinations on water rights and have claimants present fully documented claims at the outset), the idea was to eliminate certain work entirely by requiring that claims be proved early in the process and eliminating subsequent opportunities by a claimant to offer proof. Ms. Markham acknowledged that recommendation #2 (independent of the adjudication process, create a new process for Ecology to validate water right claims, such that when an area was subsequently adjudicated, the court would only need to consider evidence of water use post-dating Ecology's determination) would involve the shifting of a role currently served by the adjudication court to Ecology.

***Presentation and Discussion with Susan Cottingham of Montana's Reserved Water Rights Compact Commission***

Our first guest speaker from outside the AGO was Susan Cottingham. Ms. Cottingham has served as staff director for the Montana Reserved Water Rights Compact Commission since 1991. In this capacity she has directed the negotiation of five complex Indian water rights settlements and three other compacts for federal reserved rights for the National Park Service, the Bureau of Land Management, and the United States Fish and Wildlife Service. She previously served as historical/legal researcher for the Commission for five years. Before moving to Montana, she was a Planning Director for the Town of Crested Butte, Colorado.

Ms. Cottingham provided four handouts to the group: (1) Sections from the Montana Code: 2-15-212 (Reserved Water Rights Compact Commission) and 85-2-217 (Suspension of Adjudication); (2) Montana Adjudications Program Expenditures Since 1974; (3) Montana General Adjudication Map status as of May 2002; and (4) Memorandum of Understanding Between State of Montana Reserved Water Rights Compact Commission and Confederated Salish and Kootenai Tribes of the Flathead Nation. Ms. Cottingham also provided two maps to the Task Force, one showing federal and Indian lands in Montana claiming reserved water rights, the other showing places of use and points of diversion on the Flathead Indian Reservation.

Ms. Cottingham described Montana's Water Court and its Reserved Water Rights Compact Commission, both which were created by the state Legislature in 1979. Montana's Water Court is a statewide court. The decisions of the court are made by the Chief Water Judge (currently Judge Bruce Loble), who is appointed by the State Supreme Court, and three other district judges that are assigned to certain water cases along with their regular court workload. The Water Court is currently focused on state-based rights in basins in the state that are not the subject of Compact Commission negotiations. In basins where there are reserved rights claims, the court generally defers its work until settlements with the Commission have been reached. The expectation is that the state-based claims and the federal claims will eventually be brought together into a single court decision.

Montana's Compact Commission has nine members, four appointed by the governor, two appointed by the presiding officer of the state senate, two appointed by the speaker of the house of representatives and one appointed by the attorney general. The Commission is served by ten



staff, including attorneys, historical researchers, scientists, and administrative staff. On behalf of the State of Montana, the Commission negotiates in a sovereign to sovereign capacity with the United States and the particular tribe. For successful negotiations the Commission endeavors to understand the current state-based water rights so that it can protect the status quo of existing state-based water users while at the same time working to recognize tribal water claims.

All negotiations of the Commission are open to the public. Negotiations, even preliminary negotiations, take months, if not years, to complete. For example, the Memorandum of Understanding between the Commission and the Salish and Kootenai Tribes (one of Ms. Cottingham's handouts), which established ground rules for negotiations and covered topics like agenda setting and press contacts, itself took several years to negotiate.

Once the three parties to a negotiation (tribe(s), state, and United States) reach an agreement, the agreement must go through an approval process before it is presented to the Water Court. This involves each party obtaining legislative approval for their commitments in the settlement agreement. Thus, the Commission seeks approval from the Montana Legislature, the United States seeks approval from Congress, and the tribe(s) seeks approval from its tribal council. Ms. Cottingham noted the value of the legislative Commission members in obtaining approval from the state Legislature. Ms. Cottingham noted that the federal approval process can be bumpy, particularly since many settlements involve federal funding of infrastructure projects that facilitate water use.

When the Water Court accepts a settlement, it is generally filed as a preliminary decree. (Ms. Cottingham noted that Tab 3 of the AGO Reserved Rights Report includes a copy of the Fort Peck decree.) The Water Court may only accept or reject the settlement, it may not add terms to the agreement.

Ms. Cottingham noted some aspects of recent settlement agreements. In all five completed negotiations over tribal rights, the tribes have agreed to subordinate their rights to other rights and the status quo of state-based rights has been confirmed.

Ms. Cottingham responded to the following questions from Members of the Task Force:

- What happens if the Legislature proposes an amendment to a settlement agreement?

None of the legislative bodies (state, federal or tribal) may unilaterally change a settlement agreement. If one of the legislative bodies proposes an amendment, the proposal is sent back to the three negotiating parties to decide whether to amend their agreement.

- Who has standing to challenge an agreement negotiated through this process?

Negotiations are open to the public, so any member of the public may raise issues with the negotiations as they are proceeding. The Commission engages in significant public outreach in an attempt to inform interested persons of negotiations as early in the process as possible. Members of the public offer input when a settlement agreement is

considered for approval by one of the legislative bodies. Finally, persons with standing can file objections when an agreement is submitted to the Water Court.

- Has the Endangered Species Act (ESA) impacted water right negotiations in Montana?

No. Montana has very few major ESA issues. There are some ESA listings in the Flathead area and for the Milk River.

- Are the settlements subject to review under an environmental review statute such as the National Environmental Policy Act (NEPA)?

No. A settlement agreement itself is not subject to review under NEPA or Montana's equivalent, MEPA. However, projects called for by a settlement agreement, such as a dam enlargement project, are subject to NEPA and MEPA review.

- Does Montana rely on basin closures or relinquishment?

Relinquishment of existing rights is not relied on to a significant degree and most of the Compacts result in maintaining the status quo of existing water rights. Several of the Compact agreements include some form of basin closure that prevents new water uses. While not fitting into the basin closure or relinquishment category, it is useful to note that a water bank was established in the Milk River area where water is short. The bank allows water users to temporarily bank water (not use for a period) in exchange for payments and without any permanent loss of banked rights.

***Presentation and Discussion with Professor Robert Anderson, University of Washington School of Law, Director of Native American Law Center***

Our second guest speaker from outside the AGO was University of Washington Law School Professor Robert Anderson. Professor Anderson directs the Native American Law Center. Between 1995 and 2001, Professor Anderson worked for the United States Department of Interior. He served as Associate Solicitor for Indian Affairs and as Counselor to the Secretary. He acted as lead federal negotiator on Indian water right claims involving the Snake River basin, the Klamath River basin, and the Lummi Indian Nation. Between 1983 and 1995, he served as Senior Staff Attorney for the Native American Rights Fund.

We asked Professor Anderson to describe his experiences working on the negotiations in the Snake River and Klamath River basins and those involving the Lummi Indian Nation's water right claims. We asked him to provide his perspective on whether negotiations of reserved rights can be successful when there is no overlying legal case. We also asked that he offer any comments or suggestions for developing new systems for resolving water rights disputes in Washington.

Professor Anderson made several general observations during his discussion with the Task Force. He noted that both federal courts and courts in Washington state have found tribal reserved rights to fisheries at off-reservation locations. Professor Anderson believes the existence of these rights should be taken as a given in negotiations addressing tribal water rights.

Professor Anderson discussed negotiations in Idaho involving the Idaho Power Hells Canyon Project. There, discussions involved establishing different target flows for different types of years (*e.g.*, dry, wet, average), identifying how much water was necessary in a given type of year and then determining ways to avoid impacting existing users during low water years.

Opportunities for success are presented, Professor Anderson noted, if negotiators look at a specific area such as a single drainage basin and attempt to identify the issues in that basin (in some basins the primary issue might be water quality instead of water quantity) and then identify measures that might address these issues.

Professor Anderson observed that agreements can be reached if the parties focus on what can be done and on the needs of the participating parties. The State of Idaho was willing to agree to a schedule of water to remain in the river but would not agree that the tribe had a reserved right to a particular quantity of water. The tribe was willing to consider accepting the state's approach because a schedule of water in the river would produce the same results as a reserved right to water in the river. This approach is similar to the approach taken in other negotiations where a tribe has been willing to subordinate its right to junior state users in exchange for commitments to provide wet water to the tribe.

Professor Anderson noted that, in the Idaho case, the overlay of the ESA enabled the Idaho Attorney General's Office to be instrumental in getting the irrigators to the table as a unified group. Also, the state and the local power company played a large role in getting the state legislature and congressional delegation to support the agreement.

In the context of the failed Lummi negotiations which occurred before the United States brought suit in federal court, Professor Anderson noted that the amount of water at issue was relatively small. At one point, the three main parties (the Lummi, U.S. and State) had an agreement that would have involved funding a \$35 million water treatment project. Ultimately, other groups prevented realization of the settlement and the United States eventually sued to provide the overlay of a case.

Professor Anderson emphasized that in our region, any water rights settlement needs to address both ESA and Indian water right concerns. He opined that a settlement could come up with a habitat conservation plan that satisfies ESA requirements but a state might still face tribal claims to a particular instream flow.

The following general observations regarding factors that effect the possibility of successful negotiations were offered by Professor Anderson:

- Both unpermitted and illegal water use should be considered when looking at how to address water rights issues in a particular basin.
- Both the *Rettkowski* case and limited funding restrict the state's ability to take enforcement actions.

- Where parties obtain technical information up front and agree on the scope of necessary studies, negotiations are more likely to be successful.
- A Cedar River HCP-type model has potential for resolving some water rights disputes.
- Given the presence of ESA concerns and that many basins in Washington are overappropriated, Professor Anderson expressed doubt about the likelihood that Washington could find success with a Montana-like compact commission.
- Negotiations with tribes can be enhanced if discussions address future permitting and the state is willing to consider not issuing new water rights in water short areas.

Professor Anderson responded to the following questions from Members of the Task Force:

- What do you (Professor Anderson) think about the recommendations contained in the *Streamlining Adjudications* report?

The recommendations that include having the agency do as much work in advance as possible but with the court still retaining the decision-making role appear the most promising in terms of making the process go more quickly and also making sure it is the court who makes the final decision. Professor Anderson noted that Oregon's system is primarily administrative, but it does not preclude McCarran Amendment state court jurisdiction.

- In what forum should the State engage tribes on water rights issues?

There is not a particular forum that is better than others. With respect to tribal interests, Professor Anderson emphasized the key is getting a dialogue going with the tribes. He believes most tribes are willing to talk about ways to avoid litigation over ESA and instream flow issues if there is a real policy commitment on behalf of the state legislature and the executive to work together on these issues.

The State and the tribes claiming an interest in a particular watershed could work out an agreement up front that would govern activities during negotiations. Commitments might include: moratorium on new permits while negotiations are underway or, at least tribal consultation before new permits are issued; plan for developing a common database; and commitments to address ESA issues.

Ultimately, some type of lawsuit is probably necessary to confirm any final agreement that is reached, but it could be in the nature of a consent decree where all parties have reached a settlement before the lawsuit is filed.

### ***Miscellaneous Updates***

Assistant Attorney General Mary Sue Wilson reported on her recent communications with the Department of Interior. Rod Walston, Deputy Solicitor at the Department of Interior,

confirmed that Interior is developing a new approach to non-Indian reserved water rights claims. A written description of this new approach should be made public in the next couple of months. The new approach will involve Interior's attempt to work more closely with states and approaching non-Indian reserved rights claims "different than" the previous administration addressed them. Mr. Walston also confirmed that the federal government is approaching McCarran Amendment questions more judiciously these days. The federal government is less likely now than in the past to object to state court jurisdiction if a particular case is comprehensive enough and if the federal government agrees there is an interest in an adjudication.

Mary Sue distributed the Department of Ecology's Draft Executive Summary of a Legislative Report on the *Feasibility of Conducting Negotiations with Other States and Canada on Water Bodies Shared with Washington*. The draft executive summary describes existing agreements between Washington and Oregon, Washington and Idaho, and Washington and British Columbia addressing specific shared water bodies. It also addresses the status of consultations between Washington and Idaho regarding the shared Spokane-Rathdrum Prairie Aquifer. The draft concludes that additional agreements with bordering states or British Columbia do not appear necessary at this time.

#### ***Planning for Next Meeting (March 25, 2003)***

The next Task Force meeting is scheduled for Tuesday, March 25, 2003 in Olympia, from 1:00 p.m. to 4:00 p.m. **Note: This is a correction from the March date announced at the January meeting.**

Attorney General Gregoire referred Members to the *Initial Identification of Types of Disputes the Task Force May Examine* (from June 2002 Task Force meeting). The list includes seven categories of disputes for which the Task Force might want to develop new processes.

Attorney General Gregoire proposed that staff review data associated with each category. Based on criteria such as the numbers of cases in each category and the apparent need for alternative processes, staff will develop a paper that discusses each category and proposes whether or not the Task Force should address the category and explains the rationale for each proposal based on identified criteria. At the next meeting, the Task Force will review and discuss this analysis and decide whether any revisions are necessary. Then, the Task Force will prioritize the categories to be discussed. The staff paper referenced herein will be distributed to the Task Force by early March.

Attorney General Gregoire proposed that staff also prepare a working document to guide the Task Force's consideration of alternative processes for various categories of water rights disputes. Therefore, in advance of the next meeting, staff will distribute a spread sheet describing in narrative fashion: (1) the existing process for each type of dispute, (2) models used elsewhere, and (3) other options (such as options suggested by members, suggested in the literature, suggested by legislative proposals).

Other items on the agenda for the March meeting include:

- A report about data compiled in response to requests made at the October 2002 meeting. This data will document the number of water right cases, an estimate of the state's current staff allocations, and an estimate of expenditures associated with water rights disputes. To the extent possible, this will include: PCHB water rights cases and subsequent appeals; Ecology water rights decisions; adjudications; other court actions involving water right issues; and watershed planning efforts.
- Distribution of a map of Washington depicting tribal water claims.
- A summary of water bills pending before the Legislature.
- An estimate of costs associated with the various recommendations included in the *Streamlining Adjudications* report.

The meeting adjourned at approximately 4:10 p.m.



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary March 25, 2003 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Member Bill Lynch, Representative Bruce Chandler, Representative Kelli Linville, Senator Karen Fraser, Senator Jim Honeyford, Keith Phillips on behalf of the Department of Ecology.

Members not present: Judge Schultheis; Judge Cooper.

### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Alan Reichman, Tammy Teeter

*Legislative Staff:* John Charba, Ken Hirst, Karen Terwilleger, Gary Wilburn

*Others:* Jon Hare from the Chehalis Tribe

*The meeting was called to order at approximately 1:15 p.m.*

Attorney General Gregoire reviewed the agenda and topics to be covered at the meeting. Participants and observers who had not attended previous meetings were introduced.

### ***Legislative Update and Data Reports***

Senator Jim Honeyford provided an update on Senate water policy bills, using the list of bills in the handout entitled "Live Water Bills - March 20, 2003". Senator Honeyford explained the topics covered by each bill and why each had passed. For subjects addressed both in Senate and House bills but only passed by the House, he explained why Senate action was not taken.

Representative Bruce Chandler provided a similar explanation for the House bills (Rep. Linville had not arrived at this point in the meeting). He focused primarily on describing those bills that addressed a subject not addressed in the bills passed by the Senate, that were already described by Senator Honeyford. Representative Chandler said that at this point he was not aware of any agreement on a process for reconciling the differences in the House and Senate action on the water bills.

Attorney General Gregoire described an offer from U.S. Interior Secretary Gale Norton to initiate a joint effort of the federal government and Washington State to explore dispute resolution alternatives to the current methods being used to address federal reserved water rights, principally general stream adjudications. Secretary Norton's impression is that there is no "model" approach and that all of the Western states are experiencing high costs and lengthy time delays in resolving complex water management disputes.

Deputy Attorney General Rob Costello provided a briefing on the geographical extent of Indian reserved rights, distinguishing between the reservation of "land-based" rights for use on the reservations, and the reservation of "rights" with water use implications in the areas ceded by the treaties. He provided a state map depicting these ceded areas, entitled "Historical Tribal Land and Current Reservations", as well as a 1977 document prepared by the U.S. Bureau of Indian Affairs entitled "Usual and Accustomed Fishing Places of Certain Western Washington Treaty Tribes Adjudicated in *United States v. Washington* No. 9213 as of January 1, 1977."

Task Force Member Kaleen Cottingham described the report she and Robyn Bryant of the Environmental Hearings Office prepared. The report, entitled "Overview of Water Disputes Heard by the Pollution Control Hearings Board" (March 2003), was sent to all Task Force members in advance of the meeting. The report describes the water resources related activities handled by the Pollution Control Hearings Board over an eleven year period (1992-2002).

Assistant Attorney General Alan Reichman distributed three handouts, one entitled "Expected Efficiencies Resulting from the Alternatives Proposed by *Streamlining the Water Rights General Adjudication Procedures*." This report supplements the *Streamlining Adjudications Report* distributed and discussed at the January Task Force Meeting. AAG Reichman also distributed a one page document prepared by Ecology's Water Resources Program and entitled "Appeals/Enforcement Complaint Actions January 2001 through December 2002." This shows the number of enforcement actions (orders and penalties) taken and the number of water resource PCHB appeals during this time period. As the appeals number encompasses appeals of all Ecology water resource decisions (not just enforcement actions), we will supplement this information to show the total number of Ecology water resources actions during this time period. Finally, AAG Reichman distributed a map of Washington depicting the 62 Water Resource Inventory Areas (WRIAs) and, within each WRIA, the numbers of pending new water right applications, water right change applications, permits, certificates, and claims.

### ***Scoping Document Discussion***

The Task Force reviewed the *Proposed Scoping Table* (dated March 12, 2003), distributed in advance of the meeting. The Task Force reviewed the proposals for further action and tentatively accepted the recommendations listed in the last column of the table. As a result, the first and last categories listed (Two-party disputes and Interstate/International Disputes) were tentatively set aside as categories on which the Task Force will not focus. This decision was made with a caveat that the group will revisit these categories as alternatives for other categories are developed to determine whether any such alternatives could also be available for two-party or interstate/international disputes. In addition, with respect to interstate/international disputes, it was recommended that Ecology explore whether to engage in a dialogue with its counterpart in British Columbia to discuss international options.

The remaining categories of disputes were arranged in the following priority order: (1) Historic Claim Disputes; (2) Water Rights Management Disputes; (3) Water Rights Enforcement Disputes; and (4) Instream Flow Disputes. This priority order is reflected in the revised *Scoping Table* (dated April 24, 2003).

The group did not identify a specific priority number for the Federal and Indian Reserved Rights Disputes category. This was in part a result of Attorney General Gregoire's proposal that the Task Force tentatively suspend its efforts on this category while the Attorney General's Office works directly with the federal government to explore possible options to address this category. During the discussion, a Task Force member advocated for tribal involvement if the Task Force decides to explore new systems for addressing disputes involving Indian reserved water rights. Although the Task Force did not identify a specific priority number, the Federal and Indian Reserved Water Rights Disputes category immediately follows Historic Claims Disputes on the



revised *Scoping Table* as these categories have some similarities, including that both are frequently addressed using the same process, *i.e.*, the general adjudications process.

Additional discussions about the four prioritized categories included a discussion regarding whether to divide Water Rights Enforcement Disputes into two subcategories, those that involve a single water user and those that involve basin-wide enforcement. This concept is reflected in the Revised Table. This division is logical in that the current process for enforcement actions involving single water users is known (enforcement action may be appealed to PCHB/PCHB decision may be appealed to courts) and is the same process as that used for Water Rights Management Disputes. In contrast, in basins that have not been adjudicated (the large majority of basins), there is no current process for basin-wide enforcement in light of the *Sinking Creek* Supreme Court ruling.

There was also discussion regarding whether Instream Flow Disputes present more water policy issues as opposed to process issues. This discussion will be revisited when the Instream Flow Disputes category is considered.

### ***Existing Processes and Alternative Processes***

Next, the Task Force engaged in a limited review and discussion of the second table, *Working Document: Existing Processes and Possible Alternatives* (dated March 12, 2003). This table presents a description of the systems currently used to process the various categories of disputes described in the *Proposed Scoping Table*. To facilitate Task Force discussions, the table also begins to identify alternative processes. The two existing processes described on pages 1 and 2 of the *Working Document* deal with the large majority of water resources disputes. The third and fourth existing processes described on page 3 of the *Working Document* are used much less frequently.

Because Historic Claims Disputes was the group's first priority and because most historic claims disputes are addressed through general adjudications in superior court, the group's initial discussion primarily focused on page 2 of the *Working Document*. This page includes a listing of possible minor changes to the general adjudications system and possible major changes to this system. The group identified several additional suggested minor and major changes. These have been added to the revised *Working Document* (dated April 24, 2003).

Initial discussions regarding the *Working Document* were limited. Discussions regarding the document will continue. Task Force members are encouraged to identify alternative processes (both minor and major) that they would like to see captured on the *Working Document*.

### ***Plan for Upcoming Meetings***

Based on the priorities identified by the Task Force during its discussion, the AGO has developed a proposed schedule for the next three meetings. A detailed schedule is attached hereto. In summary, following the proposed schedule, the May meeting would be devoted to discussing Historic Claims Disputes and alternatives to the superior court general adjudications process. In advance of the May meeting, staff will develop a working document that focuses solely on these topics and fleshes out details associated with the various possible alternatives. At the May meeting, discussion would begin with the group identifying the strengths and weaknesses of the existing system in order for the group to be able to evaluate the potential for any alternative to incorporate the strengths and address the weaknesses. Thereafter, the May meeting would involve evaluation and ranking of the various alternatives. By the end of the May meeting, the Task Force will have arrived at tentative conclusions regarding alternatives to address Historic Claims Disputes and alternatives to the superior court general adjudications system.

Following the proposed schedule, the July meeting would follow a similar framework but discussion would focus on the next two categories of disputes (Water Rights Management Disputes and Water Rights Enforcement Disputes) and the system that is currently used to process these categories of disputes (the PCHB/then to superior court model depicted on page 1 of the *Working Document*). Again, discussion would begin by identifying the strengths and weaknesses of the existing system and then turn to evaluating and ranking various alternatives.

Following the proposed schedule, the September meeting would follow a similar framework but discussion would focus on the remaining categories of disputes (Instream Flow Disputes and Federal and Indian Reserved Rights Disputes).

***Logistics for May 22, 2003 Meeting in Yakima***

At the March meeting, information was distributed regarding the location and directions to the May meeting in Yakima. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary May 22, 2003 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Member Bill Lynch, Representative Bruce Chandler, Representative Kelli Linville, Senator Jim Honeyford, Keith Phillips on behalf of the Department of Ecology.

Senator Karen Fraser participated by telephone.

### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, David Mears, Tammy Teeter; Mary Sue Wilson participated by phone.

*Legislative Staff:* John Charba, Caroleen Dineen, John Stuhlmiller, Karen Terwilleger, Sam Thompson, Gary Wilburn

*Department of Ecology Adjudications Staff:* Doug Clausing (referee), Becky Johnson, Elaine Peterson.

*Others:* Rachael Paschal Osborn

*The meeting was called to order at approximately 1:00 p.m.*

Participants and observers were introduced.

### ***Introduce Plan for the Day***

Attorney General Gregoire reviewed the agenda and topics to be covered at the meeting. This was the first Task Force meeting dedicated to the development of tentative recommendations. The topic for this meeting was Historic Claims Disputes/Superior Court General Adjudications.

The Attorney General emphasized the importance of the Task Force working to develop tentative recommendations on today's subject areas as time was running out and the Task Force's report is due to the Legislature this December. She also described her plan to have staff write up the results of the meeting's discussion into a document that identifies the recommendations made, including a description of each recommendation and reasons for each recommendation. This draft document will be circulated to members for review and comment. A final version of the document will ultimately become the first part of the Task Force's report to the Legislature.

***Review Worksheet # 1: Discuss Strengths and Weaknesses of Existing Process***

Senior Assistant Attorney General David Mears led the Task Force in its review of Worksheet #1: Historic Claims Disputes/Superior Court General Adjudications (dated May 22, 2003). Mr. Mears first provided an overview of the information in the first and second columns. He explained that historic claims disputes generally present issues concerning the validity, quantity, and/or priority of water rights that pre-date the water codes (1917 for surface water and 1945 for ground water). Because these water rights pre-date the codes, they have not been the subject of a permitting process. Rather, they are documented by the filing of a claim in the state claims registry. Until these rights are adjudicated (a process that determines their validity based on continuous beneficial use), their validity remains uncertain.

The existing Superior Court General Adjudications process established by the water code is the means through which historic claims are validated. This process generally involves 5 steps: (1) Ecology or a member of the public petitions for the commencement of an adjudication of a particular water body; (2) claimants are identified and provided notice of upcoming adjudication; (3) claimants are provided an opportunity to present evidence through an evidentiary hearing; (4) claimants can dispute preliminary findings through an exceptions process; and (5) a final report is issued by court confirming valid rights and establishing their priority dates.

Next, Mr. Mears led the Task Force through a discussion of the third and fourth columns on Worksheet # 1. The third column identifies strengths of Washington's existing superior court general adjudications system. The fourth column identifies weaknesses of the same system. As a result of the discussion, one "strength" was added to the third column (the ability to address federal reserved rights) and five weaknesses were added to the fourth column (surface water only; cost; no follow-up: adjudication provides only a snapshot; inexperience of claimants necessitates more "bites at apple"; and difficult to build historical knowledge/experience because same superior court does not hear all adjudications).

During the discussion of strengths and weaknesses, the following observations were made:

- While the topic for this meeting did not include federal and Indian reserved rights (that topic is scheduled for discussion in September), the Task Force should be mindful that, under the McCarran Amendment, these federal rights may not be subject to state court jurisdiction if a state adjudication is not sufficiently comprehensive.
- With respect to the identified weakness that a claimant may have too many opportunities to present evidence of his/her claim, Ms. Cottingham noted that claimants also frequently seek to amend their claims through the administrative process (Ecology decides, PCHB reviews), providing yet another opportunity to substantiate a claim.
- With respect to the time involved in the Yakima Basin adjudication (commenced in 1977, still underway), it was noted that the first ten years of that case were largely devoted to litigating questions involving the court's jurisdiction. Since those issues were decided in the Yakima adjudication, future adjudications will benefit from the guidance provided in Yakima and should not require a similar ten year "start up" process.
- In discussing the topic of ADR, one member asked what motivates people to participate in mediation. Possible motivations noted included: participants with sizeable claims such as irrigation districts may see the value of mediation and lead the way; preliminary decisions by the court may facilitate participation as claimants learn they may not realize the entirety of their claim through litigation.

- Senator Fraser made three observations:
  - An adjudication that covers surface water only does not appropriately account for hydraulic continuity;
  - Adjudications are very expensive. When the code was initially adopted, property owners paid for the entire adjudication; later this was changed to divide funding between property owners and the state; finally, it was changed to require the state to fund nearly the entire process; and
  - Follow-up documentation of the results of adjudications is lacking.
- The certainty provided by an adjudication does not last very long because there is no mechanism to address events that occur post-adjudication.
- The proceedings conducted by the referee are less formal than typical court proceedings. This facilitates participation by pro se parties. On the other hand, the adjudication process can be quite complex, making pro se participation more difficult.
- The current system whereby no centralized court handles multiple adjudications does not facilitate development of expertise over time, or if expertise is developed in a case such as the Yakima adjudication, once the adjudication is over, the court will no longer work on adjudications, putting to waste the expertise that has been developed.

Finally, the Task Force reviewed the items listed in the fifth column of the worksheet, “Criteria for Success.” These criteria were initially developed at the first meeting of the Task Force in June 2002. The Task Force modified one of these criteria and added three new criteria. Added criteria were: sufficient data to make process work; builds institutional memory/experience; and built-in system of prioritization.

While discussing criteria, the appropriate scope of the Task Force’s recommendations was discussed. Some members had suggested that there are concerns regarding what happens before and after adjudications. There is concern that the agency and/or courts may lack sufficient data to initiate and prosecute a successful adjudication. There is also concern that the agency and/or courts may lack sufficient resources to implement court decrees once issued. The Task Force decided its focus would be on the adjudications process, not the before and after. However, the final Task Force report should note the importance of other factors, such as funding, development of necessary technical data, and follow-up systems.

There was also discussion about the limitations of the adjudications process in the context of a prior appropriation system. The adjudications system simply identifies the scope and priority of valid legal rights, it does not determine whether there is sufficient water available to satisfy all valid rights. One member described the adjudications system as a system that addresses only the supply side of the equation and says nothing about the demand side. It was noted that the demand side (or whether water is available) involves the “management” of water resources, and that is not a function of the court. Members suggested the management role is more appropriately performed through the permitting process (done by Ecology) and through watershed planning efforts.

An updated version of Worksheet # 1, dated June 2003, has been modified to incorporate the discussion of the Task Force.

### ***Review Worksheet # 2: List of Alternatives***

Next, David Mears led the Task Force in reviewing and discussing Work Sheet # 2 (dated May 22, 2003). This work sheet presented nine alternatives to Washington's existing superior court general adjudications system. Each was assigned a letter, A – I. The goal of this discussion was to ensure that each alternative was sufficiently defined and understood by members to allow members to identify and rank preferred alternatives and eliminate those with little or no support from members. However, the precise descriptions of each alternative are expected to be further refined based on subsequent discussions and comments.

As a result of the discussion, members modified the description of several of the alternatives to better reflect the concepts they embodied. Key points from the discussion of each alternative were recorded in the "Comments" column of the worksheet. For several of the alternatives, most notably letters B (mediation), F (limited special adjudications), and G (adjudications to cover surface and ground water), the possibility of recommending discretionary authority rather than creating a statutory mandate applicable to all adjudications was discussed. For example, with respect to letter G, it was suggested that rather than mandating that all adjudications address both surface and ground water, the Task Force might want to recommend that courts be directed to consider, at the outset of every specific adjudication, the question of whether the case should include both surface and ground water.

With respect to letter H, modify watershed planning statute to expand responsibilities of the planning group to include facilitating basin-wide court enforceable water apportionment agreements, concerns were raised about how to protect those interested parties who did not participate in the watershed planning effort.

A number of concerns were raised with respect to letter I, create a specialized water court. Concerns included constitutional limitations, funding impacts, and political ramifications. It was agreed that additional analyses of legal and fiscal impacts would be necessary before making a final decision about this alternative. Staff will work to develop an analysis of constitutional concerns for use at the next meeting as water courts may be considered as an alternative to disputes involving water rights management and enforcement questions.

An updated version of Worksheet # 2, dated June 2003, has been modified to incorporate the discussion of the Task Force.

### ***Evaluate Alternatives Listed on Worksheet # 2***

Once members determined they had a general understanding of each alternative, Attorney General Gregoire asked each member to select his/her preferred alternatives by casting four votes a piece. As a result of this voting and subsequent discussion, the Task Force eliminated three of the nine from further consideration, combined alternative D with alternative A, and ranked the remaining 5 alternatives by order of preference. The updated version of Worksheet # 2 reflects these decisions. As a result, the recommendations that will be carried forward in the Task Force draft report are:

- (tied for 1st) (A) Comprehensive background information developed early in process, claimants present fully documented claims at outset, and Ecology makes tentative determinations on water rights. The ability to employ a "fact finding" process will be incorporated into this alternative (see alternative D).
- (tied for 1st) (F) Allow limited special adjudications.

- (2nd) (B) Expand the use of mediation.
- (3rd) (I) Create specialized water court or water judge positions.
- (4th) (C) Authorize pre-filed written testimony.

The three alternatives eliminated from further discussion were:

- (E) Independent of the adjudication process, create a new process for case-by-case validation of water right claims.
- (G) Mandate that all adjudications address both surface and ground water where appropriate.
- (H) Modify watershed planning statute to expand responsibilities of the planning group to include facilitating court-enforceable water apportionment agreements.

#### ***Upcoming efforts to document May 22<sup>nd</sup> decisions***

During the last half hour of the meeting, the Task Force continued discussions regarding the selected alternatives. Staff will prepare a draft summary of the selected alternatives. The summary will include a description of each alternative, together with a discussion of related issues (e.g., funding needs, legal concerns). This draft will be circulated to members for review and comment. The Task Force agreed that legislative staff should work with AGO staff to further refine the water courts/water judges alternative.

#### ***Plan for Next Meeting (July 24, 2003)***

The July 24, 2003 meeting will follow the same format as used at the May meeting. The July meeting will focus on the next two categories of disputes (Water Rights Management Disputes and Water Rights Enforcement Disputes) and the system that is currently used to process these categories of disputes (the PCHB reviews Ecology decisions/appeals of PCHB decisions go to the superior and appellate courts for APA review). This model is depicted on page 1 of the *Working Document* distributed to the Task Force in April. In advance of the July meeting, staff will develop a working document that focuses solely on these topics and fleshes out details associated with the various possible alternatives. At the July meeting, discussion will begin with the group identifying the strengths and weaknesses of the existing system and thereafter be followed by an evaluation and ranking of the various alternatives. By the end of the July meeting, the Task Force will have arrived at tentative conclusions regarding alternatives to address Water Rights Management Disputes and Water Rights Enforcement Disputes.

#### ***Logistics for July 24, 2003 Meeting***

The July 24<sup>th</sup> meeting will take place at the Offices of the Attorney General on the 7<sup>th</sup> Floor of the Highway-Licenses Building in Olympia. Although the meeting is currently scheduled for 1:00 p.m. to 4:00 p.m., it may be rescheduled for 9:30 a.m. to 12:30 p.m. The time for the meeting will be confirmed in early July. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary July 24, 2003 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge Richard Hicks, Judge Linda Krese, Court Commissioner Sid Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Chair Bill Lynch, Representative Bruce Chandler, Senator Jim Honeyford, Keith Phillips on behalf of the Department of Ecology.

Senator Karen Fraser and Judge John Schultheis participated by telephone.

*Absent members:* Representative Bruce Chandler, Representative Kelli Linville, Judge Michael Cooper

### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, Tammy Teeter, Erik Cornellier

*Legislative Staff:* John Charba, Evan Sheffel, Caroleen Dineen, Ken Hirst, Bernie Ryan, John Stuhlmiller,

*Office of Administrator of the Courts:* Rick Neidhardt.

*Others:* Kathleen Collins, John Hollowed, Kris Kaufmann, Mike Schwisow, Dawn Vyvyan.

*The meeting was called to order at approximately 9:00 a.m.*

Participants and observers were introduced.

### ***Introduce Plan for the Day***

Attorney General Gregoire reviewed the agenda and topics to be covered at the meeting. This was the second Task Force meeting dedicated to the development of tentative recommendations. The topic for this meeting was Water Right Management and Enforcement Disputes/Alternatives to the PCHB-Courts via the APA Process.

Assistant Attorney General Mary Sue Wilson described the materials distributed in advance of the meeting which included an agenda for the meeting, Worksheets Numbers 3 & 4 to guide Task Force discussion, a July 2003 discussion paper on Options for Specialized Water Courts with two attachments (the March 2003 PCHB Overview of Water Disputes and 1994 SB 6603), July 2003 PCHB Survey Results, a draft Summary of Task Force Recommendations from the May meeting, and a poem from Colorado Supreme Court Justice Hobbs. At the meeting, the following additional items were distributed: a summary of Department of Ecology water resources appealable decisions made in 2001-2002, a copy of RCW 90.58.170 (Shorelines hearings board membership), Water Resources Program Adjudications Strategic Plan (draft 5),



Article IV of Washington Constitution (the Judiciary), and Additional Superior Court Judge Costs.

Pollution Control Hearings Board Member Kaleen Cottingham described the results from a recent survey conducted by the Environmental Hearings Office (Survey Results distributed in July mailing). The survey was posed to both attorneys and unrepresented parties who had recently participated in a hearing or mediation before the Environmental Hearings Office (EHO). Survey respondents included parties who were appellants and parties who were respondents. The EHO hopes to make a number of improvements in response to survey results including enhancing the usability of its website and strengthening interactions with unrepresented parties to ensure they understand the process and are aware of the resources and assistance available to them. The office will modify its procedural assistance handbook (that is available on the office website) to specifically address motion practice and to better describe the entire appeal process.

### ***Review Worksheet # 3: Discuss Strengths and Weaknesses of Existing Process***

Assistant Attorney General Mary Sue Wilson led the Task Force in its review of Worksheet #3: Water Right Management & Enforcement Disputes/PCHB-Courts Via APA Process (dated July 24, 2003). Ms. Wilson first provided an overview of the information in the first and second columns. She explained that the first column describes this category of disputes as including Ecology decisions on applications for new water rights and changes to existing water rights, Ecology decisions canceling water right permits and relinquishing water right certificates, Ecology orders and penalties that address use of water in violation of a permit, certificate, or claim, water use not authorized by law and Ecology orders that address water shortages in adjudicated basins. This category also includes challenges to conditions included on permits and certificates, decisions on requests to amend water right claims under RCW 90.14.065, and orders aimed at waste of water.

The existing “PCHB-then to the courts via the APA process” is the means through which water rights management and enforcement disputes are currently addressed. The second column of Worksheet #3 describes this process. The PCHB conducts *de novo* hearings, meaning the Board conducts evidentiary hearings where all sides have the opportunity to provide evidence, regardless of whether the same evidence was presented to Ecology. The Board decides the factual and legal issues independently, generally providing no deference to Ecology’s decision. When decisions of the PCHB are appealed to a superior court and higher courts, appeals are brought pursuant to the Administrative Procedure Act (APA). This generally means that the Board’s findings are reviewed according to the substantial evidence standard and legal conclusions are determined *de novo*. If a case goes from the PCHB to a superior court for APA review and later goes to the Court of Appeals or Supreme Court, the appellate courts review the findings and conclusions of the PCHB and afford no deference to the superior court’s decision.

In 2001, the total number of decisions made by Ecology’s Water Resources Program that could have been appealed to the PCHB was 679. In 2002, the total was 1419. (The high number in 2002 appears to be related to Ecology issuing metering orders to hundreds of water users and Ecology increasing its production on water right change decisions after the 2001 Legislature increased staffing for that purpose). Comparing the number of decisions made by Ecology with the number of these decisions appealed to the PCHB, 72 PCHB appeals of water rights decisions were filed in 2001 and 67 were filed in 2002. This breaks down to a 10.5% appeal rate in 2001 and a 5% appeal rate in 2002. Approximately 10% (8 or 9 per year) of the PCHB’s decisions in water right cases are appealed to the superior courts and higher, with less than half of those cases being appealed to the Court of Appeals or Supreme Court.

Next, Ms. Wilson led the Task Force through a discussion of the third and fourth columns on Worksheet # 3. The third column identifies strengths of the existing system. The fourth column

identifies weaknesses of the same system. As a result of the discussion, one “strength” was added to the third column (the appointment process) and three weaknesses were added to the fourth column (potential conflicts of interest and equity issues related to the rendering of assistance by PCHB staff; the appointment process; and the potential for establishment of policy via adjudication by two administrative agencies before going to court or through a rulemaking process).

During the discussion of strengths and weaknesses, the following observations were made:

- Judge Hicks commented that the process did not look too bad. Judge Hicks focused his comments on the number of water right decisions Ecology makes each year (ranging between 679 and 1419 in 2001 and 2002), the number of PCHB appeals from these decisions (approximately 83 per year), and the number of subsequent APA court appeals (approximately 8-10 per year). This means between 5-10% of Ecology’s water right decisions are appealed to the PCHB. Approximately 10% of the PCHB’s decisions are appealed to the courts and less than half of those go to the Court of Appeals and/or the Supreme Court.
- A member commented that the cost of taking an appeal to the next level might be the reason for the low number of appeals to superior court and higher.
- PCHB member Cottingham commented that about 85% of the cases before the PCHB settle. She clarified that many settle without going through the PCHB’s formal mediation process. Questions were raised whether the mediation process was being utilized frequently enough. It was noted that the Board provides its mediation services free of charge.
- As a comparison to the PCHB’s typical resolution of many cases within six months of filing, Judge Hicks was asked to estimate the time it takes for a new case filed in Thurston County Superior Court to go to hearing. Absent continuances or other delays caused by the parties, Judge Hicks estimated that Thurston County civil cases involving the taking of evidence generally go to hearing within a year of filing.
- Judge Schultheis asked for more details regarding the PCHB providing mediation and procedural assistance to litigants. Board member Cottingham explained that Administrative Law Judges (ALJs) who are not assigned to work on the hearing in a particular case are available to mediate and provide procedural assistance to parties. Judge Hicks commented that no such assistance is available at superior courts. If a superior court litigant requests procedural assistance, superior court clerks tell the litigant that they may not provide any assistance.
- The PCHB Board Members were asked about the kinds of cases for which the Board travels for hearings. The Board Members explained that the Board tends to travel when there are a number of witnesses residing in a location distant from Olympia. Recently, to manage travel costs, the board has limited its travel to the larger cities in eastern Washington (*e.g.*, Yakima, Spokane, Tri-Cities). As a result of more drastic cuts to the Board’s travel budget for the new biennium (7/03-6/05), travel for hearings is highly unlikely during the next two years.
- The Task Force discussed the PCHB appointment process. The Governor appoints each of the three members to six year terms. The Senate confirms each appointment. Only one of the members is required to be an attorney, although in recent years all three members have been attorneys. Several outgoing board members who were not attorneys urged the Governor’s office to continue to appoint attorneys because the outgoing members thought the process was highly legalistic and members benefited from legal training. Other qualifications for appointment are familiarity with the subject matter and no more than two

members from the same political party serving on the Board at the same time. Some members viewed these appointment/qualification issues as strengths of the system while others viewed them as weaknesses.

- A staff member commented that people may view as a weakness of the PCHB process the fact that policy can be established on a case-by-case basis through the quasi-judicial process of Ecology making a decision and the PCHB deciding the case without the formal public notice and comment required by the APA for rulemaking. Although this method of establishing administrative policy is recognized in caselaw, some people may nonetheless view it as a weakness of the system.

An updated version of Worksheet # 3, dated August 2003, has been modified to incorporate the discussion of the Task Force.

#### ***Review Worksheet # 4: Alternatives to the PCHB-Courts Via APA Process***

Next, Ms. Wilson led the Task Force in reviewing and discussing Work Sheet # 4 (dated July 24, 2003). This work sheet presented eight alternatives to “the PCHB-Courts Via the APA Process.” Each was assigned a letter, A – H. The goal of this discussion was to ensure that each alternative was sufficiently defined and understood by members to allow members to identify and rank preferred alternatives and eliminate those with little or no support from members. However, the precise descriptions of each alternative were expected to be further refined based on subsequent discussions and comments.

As a result of the discussion, members modified the description of several of the alternatives to better reflect the concepts they embodied. Members also deleted one of the original alternatives (Alternative A) and added two new alternatives (Alternatives I and J). Key points from the discussion of each alternative were recorded on the worksheet.

The decision by the Task Force to eliminate Alternative A (Modify PCHB Process and Standards) followed the discussion of members that the system generally seems to be working well in terms of timely processing cases and weeding out a substantial number of cases as they move up through the appeals process. In addition, the Task Force made observations regarding the following factors:

- The PCHB currently uses a preponderance of the evidence standard. This standard is less deferential to Ecology than would be either the “clearly erroneous” or a “substantial evidence” standard.
- If the PCHB applies a more deferential standard to its review of Ecology decisions, review would likely be on the record created at Ecology rather than *de novo*. This would require Ecology to create records for hundreds if not thousands of cases each year, requiring a substantial increase of state resources.

The decision to add Alternative I (Retain the PCHB Process and Standards with some Minor “Tweeks,” including mandating mediation in certain kinds of cases) came after the following factors were discussed:

- There needs to be adequate funding of the PCHB to ensure it has the necessary tools to continue to assist unrepresented parties.
- Use of mediation services should be enhanced. Some members did not want to see participation in mediation made mandatory for every case but thought that the Board should have the authority to mandate mediation for particular types of cases. However, mediation

should not be mandated based on the status of the participant. In other words, members believed it would be inappropriate to mandate mediation for any case which included an unrepresented party. On the other hand, it might be appropriate to mandate mediation for certain types of cases such as all those involving a penalty.

The decision to add Alternative J (Deference to Superior Court decision by Appellate Court) came after the following situation was discussed:

- Under the current process, if a case goes from the PCHB to a superior court for APA review and later goes to the Court of Appeals or Supreme Court, the appellate courts review the findings and conclusions of the PCHB and afford no deference to the superior court's decision. Therefore, for cases that do not end at superior court, this means the superior court step is generally viewed as superfluous and a potential waste of time and resources.

An updated version of Worksheet # 4, dated August 2003, has been modified to incorporate the discussion of the Task Force.

### ***Evaluate Alternatives Listed on Worksheet # 2***

Once members determined they had a general understanding of each alternative, Attorney General Gregoire asked each member to select his/her preferred alternatives by casting three votes a piece. As a result of this voting and subsequent discussion, the Task Force eliminated five of the remaining nine from further consideration (the Task Force had already eliminated alternative A) and ranked the remaining 4 alternatives by order of preference. The updated version of Worksheet # 4 reflects these decisions. As a result, the recommendations that will be carried forward in the Task Force draft report are:

- |                |     |   |
|----------------|-----|---|
| (1st)          | (F) | Create Specialized Water Court(s) to Hear Appeals From PCHB Water Decisions.  |
| (tied for 2nd) | (I) | Retain Current PCHB Process & Standards with some minor "tweeks," including mandatory mediation for certain types of cases. |
| (tied for 2nd) | (J) | Deference to Superior Court Decision In Appellate Court Review.   |
| (3rd)          | (G) | Create Specialized Water Court(s) the Hear Appeals from Ecology Decisions (Eliminate role of PCHB or make it optional).     |

The five alternatives eliminated from further discussion were:

- |     |  |
|-----|--|
| (B) | Create a New Quasi-Judicial Administrative Body to Handle all Water Rights Management and Enforcement Appeals.                           |
| (C) | Modify Standard of Review Applicable to Superior Court Review of PCHB Decision.  |
| (D) | Mandate or Authorize Automatic Direct Appellate Review of PCHB Decisions.  |
| (E) | Appeals of Water Rights Management and Enforcement Decisions Go Directly to Superior Court (Eliminate role of PCHB or make it optional). |
| (H) | Provide Authority to Ecology to Address Priority of Uses in Areas That Have Not Been Adjudicated.  |

### *Discussion of Options for Specialized Water Courts*

Ms. Wilson introduced the final topic for the day, options for specialized water court(s). She introduced the discussion paper distributed in advance of the meeting that set forth an outline of the Structure Options, Selection of Judge Options, Values, Discussion and Questions prepared by staff for consideration by the Task Force. The Task Force proceeded to discuss whether it was seeking to develop an “ideal” recommendation or a recommendation that is less than ideal, but more easily implemented. Attorney General Gregoire suggested that the Task Force could do both, that is, the Task Force could develop an option that represented the optimum, or the best ideas, and then develop a fall-back option.

Discussion ensued and the Task Force reached consensus that an option should not be rejected simply because it would require a constitutional amendment. Judge Hicks stated that he was not opposed to a constitutional amendment, and that he believed an option should include regional representation on a court with some form of centralized authority.

Thereafter, the Task Force suggested a specialized water court model with the following attributes:

- Judges come from three or four regions to sit on a single court.
- Three regions would parallel the three divisions of the court of appeals.
- If court is divided into three divisions but comprised of four judges, the fourth judge would fill an “at large” position.
- Judges should have the power to appoint special masters to assist with cases.
- Each judge should have statewide jurisdiction.
- Each judge would be elected from the division he/she came from.
- The governor should appoint each of the judges to staggered terms.
- To ensure continuity and expertise, these judges would run in a retention election rather than an open election.
- Eligible candidates for appointment would meet mandatory minimum requirements.

The Task Force designated a subcommittee to work with staff to further refine a specialized water court model or models to bring back to the Task Force for endorsement. This subcommittee is comprised of: Judge Hicks, Judge Krese, Commissioner Ottem, Judge Schultheis, Senator Honeyford, and Senator Fraser. Staff will organize a series of conference calls of this subcommittee to refine the water court recommendations and bring them back to the full Task Force in September.

### *Follow-up from May 22<sup>nd</sup> decisions*

The Attorney General’s Office has circulated a staff write up of the results of the May 22, 2003 meeting. The draft document identifies the recommendations made, including a description of each recommendation and reasons for each recommendation. Members have been asked to **review and comment on this draft document by August 25, 2003**. A final version of the document will ultimately become the first part of the Task Force’s report to the Legislature.

***Follow-up from July 24<sup>th</sup> decisions***

In the next few weeks, the Attorney General's Office will circulate a staff write up of the results of the July 24<sup>th</sup> meeting. The draft document will identify the recommendations made, including a description of each recommendation and reasons for each recommendation. Once distributed, members will be given a deadline for review and comment on this draft. A final version of the document will ultimately become the second part of the Task Force's report to the Legislature.

***Plan for Next Meeting (September 30, 2003) \*\*\*\* note change of date\*\*\*\****

The September 30, 2003 meeting will follow the same format as used at the May and July meetings. The September meeting will focus on the last two categories of disputes (Instream Flow Disputes and Federal and Indian Reserved Water Rights Disputes) and the systems that are currently used to address these categories of disputes. In advance of the September meeting, staff will develop a working document that focuses solely on these topics and fleshes out details associated with the various possible alternatives. By the end of the September meeting, the Task Force will have arrived at tentative conclusions regarding alternatives to address Instream Flow Disputes and Federal and Indian Reserved Water Rights Disputes.

Department of Ecology Task Force Member Keith Phillips will provide a summary to the Task Force in September of the Department's projections regarding future demands for general adjudications throughout the state. This should assist the Task Force as it projects the anticipated workload and costs associated with a specialized water court.

***Logistics for September 30, 2003 Meeting***

The September 30<sup>th</sup> meeting will take place at the Offices of the Attorney General on the 7<sup>th</sup> Floor of the Highway-Licenses Building in Olympia. The meeting is scheduled for 1:00 p.m. to 4:00 p.m. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary September 30, 2003 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge John Schultheis, Judge Richard Hicks, Judge Linda Krese, Judge Michael Cooper, Court Commissioner Sidney Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Chair Bill Lynch, Representative Bruce Chandler, Representative Kelli Linville, Keith Phillips on behalf of the Department of Ecology.

Senator Karen Fraser and Senator Jim Honeyford participated by telephone.

### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, Mary Sue Wilson, Tammy Teeter.

*From the Department of Ecology:* Tom Laurie.

*Legislative Staff:* John Charba, Evan Sheffel, Caroleen Dineen, Karen Terwilliger, Gary Wilburn.

*Office of Administrator of the Courts:* Rick Neidhardt.

*Others:* Kathleen Collins, John Hollowed, Mike Schwisow, Paul Flemings, Kimberly Ordon, Jeff Dickison.

*The meeting was called to order at approximately 1:10 p.m..*

Participants and observers were introduced.

### ***Introduce Plan for the Day***

Assistant Attorney General Mary Sue Wilson reviewed the agenda and topics to be covered at the meeting. This was the third Task Force meeting dedicated to the development of tentative recommendations. The primary topic for this meeting was Federal and Indian Reserved Water Rights. Before addressing this topic, the Task Force addressed some issues related to discussions and recommendations from prior meetings, including hearing Keith Phillips' report on Ecology's Evaluation of the Need for State-Wide Adjudications and a discussion of the Task Force Subcommittee's Recommendation regarding a Specialized Water Court.

Assistant Attorney General Mary Sue Wilson described the materials distributed in advance of the meeting. These included an agenda for the meeting, two recommendations from the Task Force subcommittee, a list of questions to guide discussion of the subcommittee recommendations, and Worksheets Numbers 5 & 6 to guide Task Force discussion. At the meeting, a revised version of Worksheet Number 5 and three handouts from Keith Phillips were distributed.

### ***Ecology Report on Evaluation of Need for State-Wide Adjudications***

Keith Phillips from the Department of Ecology reported on Ecology's review of the need to conduct state-wide adjudications. Mr. Phillips distributed an 8 page document entitled *Water Rights Adjudications* and two maps. The first map is entitled *Number of Water Right Permits, Claims & Certificates by WRIA, with Petitioned Basins* (September 15, 2003). The second map is entitled *Number of Water Rights Pending by WRIA, with Current Tribal Reservations and Treaty Ceded Areas* (September 23, 2003).

Mr. Phillips walked the Task Force through the *Water Rights Adjudications* document, highlighting the reasons to conduct adjudications (page 2) and the geographic distribution of adjudications (completed, pending, and unadjudicated claims, page 3). With respect to geographic distribution of claims, more than half are in Western Washington. Mr. Phillips noted that the unadjudicated claims comprise 2/3 of the total number of water rights in the state, with the other 1/3 represented by permits and certificates. The maps illustrate the distribution of these water rights throughout the state.

Pages 4 and 5 of the *Water Rights Adjudications* document describes the steps in an adjudication, the factors that influence the workload, and the participants in an adjudication (judge, court commissioner, referee, staff that serve the judge, commissioner, and referee, Ecology staff and Attorney General staff). Page 6 depicts the costs of the Yakima adjudication by these categories. The total current cost is about \$3.6 million per biennium. Since 1977, historic costs have averaged about \$2 million per biennium.

Page 7 of the *Water Rights Adjudications* document sets forth factors that might be relevant in selecting the next basin or basins in which to begin adjudication(s). These factors include whether a petition has been filed, whether there is an apparent need (based on water availability issues, permit application backlogs, or desire to begin water marketing), whether there are conflicts, workload associated with preparing for and initiating an adjudication, and other local conditions.

Page 8 presents three possible scenarios for the future of adjudications in Washington State. The first scenario, captioned "the Default Future," anticipates support of adjudications with the same resources and funding as are currently used to support the Yakima adjudication. As the Yakima adjudication ramps down over the next two biennia, the department would ramp up other adjudications. If the state continues to fund adjudications at \$3.6 million per biennium, it is projected that the state could adjudicate two basins every 5 to 10 years, taking upwards of 200 years to complete adjudicating the entire state. The second scenario, captioned "An Alternative Future," assumes an investment of 4 specialized water judges, each of whom would adjudicate between 3 and 5 basins at a time taking between two and ten years to complete each basin. At this rate and at a projected funding level of \$12 million per biennium, it would take between 10 and 70 years to complete adjudicating the entire state. The third scenario, captioned "A More Modest Future," assumes that the state would prioritize 15 basins for adjudication (this is approximately one quarter of the 62 basins statewide). Adjudications in these basins would be completed by investing two water judges at \$ 6 million per biennium.

Task Force discussion followed Mr. Phillips' presentation. It was pointed out that the Yakima adjudication is unique and the Task Force should be careful not to draw too many statewide conclusions from the Yakima experience. It was also suggested that it might be possible to do some adjudication-type work administratively to make certain improvements to the system without needing to rely completely on comprehensive judicial adjudications. Some of the preliminary recommendations made by the Task Force in May 2003 address minor administrative improvements to the adjudications process that could serve this function.



***Discussion of Subcommittee Recommendations regarding A Specialized Water Court and an Office of Water Commissioners***

Having heard Ecology's report on the demand for statewide adjudications, the Task Force began discussing the Subcommittee's Recommendation regarding a Specialized Water Court. Assistant Attorney General Mary Sue Wilson summarized the general attributes of the Specialized Water Court described in the Subcommittee's recommendations and then suggested that the Task Force begin its discussion of this topic by talking generally about the concept of creating a Specialized Water Court to determine whether the entire Task Force would endorse the Subcommittee's recommendation. Ms. Wilson invited members of the Subcommittee to offer explanations for their support of the Subcommittee's recommendation.

Much of the discussion of the group focused on whether the Task Force was prepared to recommend to the Legislature, without any caveats, that a Water Court be created. Ms. Wilson explained that Attorney General Gregoire (who had not yet arrived) urged the Task Force to limit any caveat(s) to only those issues that were truly outside the expertise of the Task Force. Attorney General Gregoire asked that the Task Force keep in mind that it had been charged, as an "expert panel," with the task of identifying new or improved procedures.

At the end of this discussion, the Task Force confirmed its support for a recommendation to the Legislature for a Specialized Water Court. This recommendation will not include the broad caveat included in the September 22, 2003 Revised Draft Specialized Water Court Recommendation. Instead it will include a more specific caveat that indicates that the Task Force intends to defer to the Legislature on state-wide budget issues (*i.e.*, how the need for a water court is weighed against other state priorities). Within what the Task Force considers its area of expertise, the recommendation will endorse the Specialized Water Court as the best mechanism for getting the job done (completing adjudications statewide) in a meaningful timeframe. Discussion leading up to the Task Force's decision to recommend the creation of a Specialized Water Court included members noting that information contained in the presentation by Mr. Phillips could be cited as justifying the need for a state-wide adjudication.

Other points made during this discussion included a suggestion that the Task Force endorse a system involving water right property title recording as a means to confirm the validity of water rights outside a court process. Given that the Task Force was nearing the conclusion of its efforts when this suggestion was made, the Task Force decided its final report should recommend that the Legislature further evaluate this option.

Although the Task Force had already stated its general endorsement of a Specialized Water Court, Pollution Control Hearings Board Chair Bill Lynch asked that there be some discussion of question number 2 (whether the Task Force endorses the variation on alternative F & G from the July Task Force meeting; the variation would give parties who seek to appeal an Ecology water rights-related decision the option of pursuing their appeal at the PCHB or at the Specialized Water Court, with the Water Court given the discretion to return the case to the PCHB). Mr. Lynch offered his opinion that the concerns that had been raised about the PCHB included that the PCHB was not considered sufficiently in touch with local concerns and was also viewed by some as not "fair." Mr. Lynch suggested that allowing cases to go to a statewide water court would not address these concerns as the court would not be a "local" entity any more than is the PCHB. He also indicated that the way to address concerns regarding "fairness" at the PCHB is to replace Board members. He pointed out that, in the next year, two of the three members will be replaced.

After discussing these comments, the Task Force reached the conclusion that the final recommendation to the Legislature on this point would acknowledge that during Task Force

meetings concerns had been raised about the PCHB, that the Task Force had not determined whether these issues were real or perceived, and that if the Legislature determines they are real, the Task Force has created an option that might address these concerns. However, if the concerns were determined not to be real, then the current system (of all water rights-related appeals from Ecology decisions going first to the PCHB) should remain intact.

As noted above, during the course of the Task Force discussion, the Task Force considered several of the questions distributed in advance of the Task Force meeting, including questions 1, 2, and 6, although the Task Force reached consensus only on questions 1 and 2 as described above. Task Force members were asked to submit written comments on the remaining questions by October 14, 2003.

### ***Report on Discussions with Department of Interior and Department of Justice***

Deputy Attorney General Rob Costello reported on Attorney General Office discussions with representatives of the Departments of Interior and Justice on the topic of addressing issues involving federal and Indian Reserved Water Rights. In his general comments, Mr. Costello emphasized the importance of not generalizing about these issues as tribes are all different and individual disputes present unique factual scenarios. He explained that he was encouraged by the commitment of the federal agencies to work cooperatively with Washington State. The federal agencies expressed their willingness to put their human, creative, and (where available) financial resources behind finding resolutions to these difficult issues.

The Department of Interior had recently announced its “4 C’s” initiative. The “4 C’s” refer to “conservation through cooperation, consultation and communication.” Interior has not issued any specific guidance on resolving disputes involving federal and/or Indian reserved water rights by the use of the “4 C’s,” but did express a strong interest in working with Washington to develop a tool chest or library of specific options that could be drawn upon in any given dispute.

Interior is interested in working with Washington to develop both “macro” and “micro” options. “Micro” refers to addressing specific questions such as methods for quantifying reserved water rights. “Macro” refers to addressing system-wide issues such as Washington’s consideration of developing a compact commission and/or a specialized water court.

The State and Federal governments agreed to work together on pursuing mediation in the *Lummi* case which involves the Lummi Tribe’s claim to a federal reserved water right to groundwater. Now is a good time to attempt to pursue settlement for at least two reasons: (1) the federal district court recently ruled on summary judgment that a reserved groundwater right does exist; and (2) both the state and the federal experts appear to agree that there is more water in the groundwater aquifer than originally thought. The parties will seek to start negotiations this Winter. The State and Federal governments agreed to track options discussed during these negotiations (including those that are rejected) for the purpose of building a tool chest of options that might be useful elsewhere.

Representatives also described some recent successes in Montana, New Mexico, Idaho and Oregon, experiences from which Washington might draw upon as it looks to build a set of options for addressing these kinds of disputes. These approaches include the use of Section 6 of the ESA to develop federal/state cooperative agreements that address water management issues and the use of science panels to provide expertise on technical issues. Some of these options will be described in more detail in the draft report of the Task Force.

***Review Worksheet # 5: Discuss Strengths and Weaknesses of Existing Processes for Federal and Indian Reserved Water Rights***

Assistant Attorney General Mary Sue Wilson distributed a revised Worksheet #5 (Federal and Indian Reserved Water Rights, September 2003) and led the Task Force in its review of the information contained on this worksheet. Ms. Wilson first provided an overview of the information in the first and second columns. The first column describes the *Winters* doctrine: when the United States reserves land for a specific purpose, the federal government also reserves sufficient water to meet the purpose(s) of the reservation. This doctrine has been applied to find reserved water rights associated with Indian reservations and other federal reservations, *e.g.*, U.S. Forest Service reservation of water for fire protection purposes. In addition to rights associated with reservations of land, with respect to tribal rights to water, when a treaty secures a “right to take fish at all usual and accustomed places,” tribes have claimed rights to minimum stream flows to protect the fish in the streams.

The second column describes the current processes used to resolve issues involving federal and Indian water rights. In terms of direct processes, in the state system, these rights can be resolved in the context of a general adjudication. During general adjudications, parties (including federal and tribal) may voluntarily negotiate their water right claims. If the state does not initiate a general adjudication, the only formal way federal and Indian water rights can be resolved is through a federal court action. “Indirect processes” that may reduce the pressure to formally resolve these issues in state or federal court include: watershed planning; actions under federal authorities such as the Clean Water Act and ESA; and contracts or other agreements that address water management issues.

Ms. Wilson led the Task Force through a discussion of the third and fourth columns on Worksheet # 5. The third column identifies strengths of the existing processes. The fourth column identifies weaknesses of these processes. No additions were made to the strengths or weaknesses columns.

***Review Worksheet # 6: Alternatives to the Current Processes Used to Resolve Federal and Indian Reserved Water Rights***

Next, Ms. Wilson led the Task Force in reviewing and discussing Work Sheet # 6 (Federal and Indian Reserved Water Rights: Alternative Processes, dated September 2003). This work sheet presented nine categories of alternatives to address disputes involving federal and Indian reserved water right issues. Each was assigned a letter, A – I. The goal of this discussion was to ensure that each alternative was sufficiently defined and understood by members to allow members to identify and rank preferred alternatives and eliminate those with little or no support from members. However, the precise descriptions of each alternative were expected to be further refined based on subsequent discussions and comments.

It was noted that Alternative A is actually a listing of the five alternatives endorsed by the Task Force in May when the Task Force focused on alternatives to the current general adjudication process (in the context of addressing historic water right claims, not federal and Indian water rights). Four of the alternatives involve modifying (with the goal of improving) the existing general adjudication process. The fifth alternative (create specialized water court) involves a system-wide change.

As a result of the discussion, members modified the description of several of the alternatives to better reflect the concepts they embodied. Alternative B was amended to add to the list of incentives a provision for the funding of mediation services. Task Force discussion about Alternative G emphasized the importance of making this alternative voluntary. As such, it could be described as one of the “tools in the tool box” that a particular watershed group could use if

there was consensus among all impacted groups. Representative Linville described efforts underway in Watershed Resource Inventory Area (WRIA) 1 (the Nooksak) that might come to a point where the parties could take advantage of this option. Alternative H was modified to eliminate the reference to consultation by the Governor's Office and instead refer more generally to "government to government" discussions. The final version of this alternative did not identify which branch of state government would "consult" with the other governments (federal and tribes).

After discussion of Alternative I, the Task Force agreed to eliminate it from consideration. This decision was based upon the following points: that the alternative appeared to describe a change to state policy rather than state processes (which is not within the Task Force's charge) and that, if the statement did represent a dramatic change in state policy, it could lead to more litigation and could upset the existing water rights priority system.

Before voting, several members suggested that the Task Force might want to agree that Alternative H (consulting with tribes and federal government to receive input on processes) should be an overarching recommendation that should be carried forward by consensus of the group. The idea was that the Task Force would endorse a suite of options, but include in its recommendation to the Legislature a statement that before the Legislature acts on the suite of options, the State should engage in government-to-government discussions to formally hear these other governments' perspectives on such options. There was no consensus for this approach so Alternative H (as revised) remained on the list for voting.

Voting results reduced the list of nine Alternatives to five. Alternative H received 14 votes, Alternative B received 12 votes, Alternative A received 10 votes, Alternative E received 6 votes, and Alternative D received 4 votes. Subsequent discussion resulted in the Task Force combining Alternatives D & E into a single alternative with a slightly modified description.

Therefore, as a result of voting and subsequent discussions at the meeting, the Task Force agreed to carry forward in its final report the following recommendations for addressing disputes involving federal and Indian water rights:

H. Initiate government to government discussions with tribes and the federal government to receive input from these governments on what processes they want the state to utilize to address their water right claims.

B. Create special incentives to encourage settlements of federal and Indian water rights (these might include: reduced fees for participants who resolve claims early; special funds for water conservation or delivery projects for claimants that settle; create special funding source for mediation services).

A. Endorse the same Alternatives Recommended by the Task Force at the May 2003 meeting on the general topic of Historic Claims Disputes and General Adjudications (this includes 4 recommendations to modify the existing adjudication system with an aim at improving it and 1 recommendation for a system overhaul, the creation of a specialized water court).

D/E. Create State Office like Montana's Compact Commission charged with the task of negotiating with other sovereigns. If an adjudication is underway, any settlement reached by the Commission would be filed in the state court adjudication. If an adjudication is not underway, any settlement reached by the Commission would be filed in federal court as a consent decree after providing sufficient opportunities for notice, comment, and objection by non-parties.

An updated version of Worksheet # 6, dated October 2003, has been modified to incorporate the discussion and decisions of the Task Force.

***Follow-up from July 24, September 30, and October 22 decisions***

In the next few weeks, the Attorney General's Office will circulate a draft report that includes results of the July 24, September 30, and October 22 meetings. The draft will identify the recommendations made, including a description of each recommendation and reasons for each recommendation. Once distributed, members will be given a deadline for review and comment. A final version of the document will ultimately become part of the Task Force's report to the Legislature.

***Plan for Next Meeting (Wednesday, October 22, 2003)***

The October 22, 2003 meeting will take place from 1:30 p.m. to 5:00 p.m. The first agenda item will be for the Task Force to address its final topic: Instream Flow Disputes. The format for discussing this topic will follow the same format as used at the prior decision meetings (May, July, and September meetings), with two worksheets describing the issues, the existing processes used to address these issues, and alternatives to the existing processes. After the Task Force arrives at tentative conclusions regarding alternatives to address Instream Flow Disputes, the remainder of the October 22<sup>nd</sup> meeting will be devoted to refining and clarifying earlier recommendations.

***Logistics for October 22, 2003 Meeting***

The October 22<sup>nd</sup> meeting will take place at the Offices of the Attorney General on the 7<sup>th</sup> Floor of the Highway-Licenses Building in Olympia. The meeting is scheduled for 1:30 p.m. to 5:00 p.m. If you have travel arrangement questions, please contact Tammy Teeter.



Christine O. Gregoire

# ATTORNEY GENERAL OF WASHINGTON

## **Water Disputes Task Force Meeting Summary October 22, 2003 Task Force Meeting**

### ***Task Force Members in Attendance:***

Attorney General Christine Gregoire, Judge John Schultheis, Judge Richard Hicks, Judge Linda Krese, Judge Michael Cooper, Court Commissioner Sidney Ottem, Pollution Control Hearings Board Member Kaleen Cottingham, Pollution Control Hearings Board Chair Bill Lynch, Senator Jim Honeyford, Senator Karen Fraser, Representative Bruce Chandler, Representative Kelli Linville, Keith Phillips on behalf of the Department of Ecology.

### ***Others in Attendance:***

*From the Attorney General's Office (AGO):* Rob Costello, David Mears, Mary Sue Wilson, Tammy Teeter.

*Legislative Staff:* John Charba, Caroleen Dineen, Evan Sheffel, John Stuhlmiller, Gary Wilburn.

*Office of Administrator of the Courts:* Rick Neidhardt.

*Others:* Adam Gravley, John Hollowed, Mike Schwisow, Dawn Vyvyan.

*The meeting was called to order at approximately 1:40 p.m..*

Participants and observers were introduced.

### ***Introduce Plan for the Day***

Assistant Attorney General Mary Sue Wilson reviewed the agenda and topics to be covered at the meeting. This was the fourth Task Force meeting dedicated to the development of tentative recommendations. The primary topic for this meeting was Instream Flow Disputes.

Assistant Attorney General Mary Sue Wilson described the materials distributed in advance of the meeting and handed out at the outset of the meeting. These included an agenda for the meeting, a meeting summary from the September 30, 2003 meeting, a revised Worksheet #6 reflecting discussion and decisions at the September 30, 2003 meeting, Worksheets #7 & #8 (revised) to guide the Task Force in considering the Instream Flow topic, and responses to questions posed in September by Senator Honeyford, Representative Chandler, and PCHB Member Cottingham. Later in the meeting, three additional documents were distributed: a Proposed Schedule for Review/Comment on the draft Task Force Report, a Summary of Preliminary Recommendations of the Task Force, and a list of Discussion Points for the October 22, 2003 meeting.

***Review Worksheet #7: Instream Flow Disputes: Background Document***

Assistant Attorney General Mary Sue Wilson led the Task Force in review of the information contained on Worksheet #7: Instream Flow Disputes. Ms. Wilson first provided an overview of the information in the first column. The first paragraph explains that disputes involving instream flows may relate to (1) establishing, (2) challenging, or (3) protecting flows from impairment by junior users. Ms. Wilson explained that the first category (*e.g.*, establishing instream flows) may not be the type of “process” dispute over which this Task Force has expertise because disputes surrounding the *establishment* of instream flows frequently concern scientific and policy disagreements rather than process issues. This issue was addressed by the Task Force later in the meeting.

The remainder of the first column identifies the ways in which instream flow requirements are established. The most common type of instream flow is one that is established by rule by the Department of Ecology. Once established, the instream flow rule is viewed as an appropriation of water with a priority date of the date of rule adoption. Once adopted, any water right junior to the instream flow appropriation will be subject to the instream flow, but rights that are senior to the instream flow rule will not be subject to it. Instream flow provisions may also be included in individual water right decisions as conditions on the exercise of an individual water right. Such conditions would govern the exercise of the particular water right but would not have any effect on other water rights. Instream flow “rights” may also be confirmed to exist when a tribal treaty to take fish from a particular water body is recognized as including a “right to a particular flow level” to support the fish.

Task Force comments resulted in the addition of the following ways in which instream flow requirements are established or recognized: (1) trust rights established for the benefit of instream flows; (2) flow conditions included in a Federal Clean Water Act, Section 401 certification; and (3) flow restrictions included in a Habitat Conservation Plan (HCP) under the Federal Endangered Species Act.

The second column describes the current processes used to resolve issues involving instream flow disputes. The column notes that different processes are used depending on how the flow was established or recognized in the first place.

The process used to resolve issues related to instream flows adopted by Ecology through rulemaking is an Administrative Procedures Act (APA) “rule challenge” action brought in superior court. Rules are reviewed on the record developed by Ecology through the rulemaking process and the court applies standards described in the APA. Instream flow rules can be set aside if the court finds: (1) the rule violates constitutional provisions, (2) the rule exceeds statutory authority, (3) the rule was adopted without compliance with statutory rule-making procedures, or (4) the rule is arbitrary and capricious. RCW 34.05.570(2)(c). When the court considers an “arbitrary and capricious” challenge, the court examines the rationale explained by the agency when it adopted the rule to determine if the record supports the conclusions of the agency. This does not involve the court making an independent judgment regarding the appropriateness of the rule.

The process used to resolve issues related to instream flow provisions included as conditions on the exercise of individual water rights is an appeal of the permit decision to the Pollution Control Hearings Board and then to superior courts. Similarly, to resolve issues related to flow conditions included in a Section 401 certification decision, the certification decision may be appealed to the PCHB. Later in the meeting, the Task Force agreed that it did not need to address issues related to instream flow conditions included in water right permit decisions or 401 certification decisions separately from how the Task Force had previously addressed general

Ecology water management and enforcement decisions that are currently subject to appeal to the PCHB.

In addition, because flow conditions included in a HCP are established under a federal process, the Task Force did not choose to separately address processes related to this category of instream flow condition.

The state process used to resolve issues related to tribal claims to instream flow rights is the commencement of a general adjudication. If the state does not initiate a general adjudication, the only formal way to address tribal claims to instream flow rights is through a federal court action. As part of either of these cases, parties may decide to negotiate, which may resolve issues without requiring formal disposition by the court. Later in the meeting, the Task Force agreed that it did not need to address issues based on tribal claims to instream flow rights separately from addressing general tribal water right issues, which were addressed at the September 2003 meeting. During this discussion, Senator Honeyford commented that he had heard that Montana's compact commission had not been particularly successful in resolving some contentious tribal water right issues.

Ms. Wilson led the Task Force through a discussion of the third and fourth columns on Worksheet #5. The third column identifies strengths of the existing processes. The fourth column identifies weaknesses of these processes. During discussion of the listed strengths and weaknesses, Senator Fraser suggested that a failure to recognize tribal rights creates both legal and financial uncertainty in a watershed.

#### ***Review Worksheet #8: Instream Flow Disputes: Alternative Processes***

Next, the Task Force reviewed and discussed Work Sheet #8 (Instream Flow Disputes: Alternative Processes, revised version). Attorney General Gregoire explained why the worksheet had been revised to eliminate the suggested processes for the establishment of instream flows from the worksheet. She explained that she did not think that disputes involving the *establishment* of instream flows were the type of "process" disputes that come within the expertise of the Task Force as disputes surrounding the *establishment* of instream flows frequently concern scientific and policy disagreements rather than process issues. At Attorney General Gregoire's suggestion, the Task Force decided not to include this category.

The remainder of Work Sheet #8 presented six categories of alternatives to address disputes involving instream flows. Each category was assigned a letter, A – F.

Following discussion about Alternative A, the Task Force decided not to address issues related to tribal claims to instream flow rights separately from addressing general tribal water right issues, which were addressed at the September 2003 meeting. Nonetheless, the Task Force decided that the description contained in Alternative A (which was an attempt to summarize decisions made at the September meeting) required revision. The Task Force agreed that its decision from the September meeting should be described as follows:

The Task Force recommends "government to government" consultation with tribes and the federal government to obtain input from these governments regarding processes that might be used by the state to resolve federal and tribal water right issues. During the consultation process, the state will put forward the three options that received support at the September meeting: (1) retain the existing structure but create incentives to facilitate settlements; (2) institute measures to improve and streamline adjudications, including creating a specialized water court; and (3) create an entity like Montana's compact commission.



Before leaving this topic, the Task Force discussed several questions about the value of a Specialized Water Court: (1) in the event that statewide general adjudications are not commenced; or (2) in the event that adjudication does not include adjudicating federal and tribal water rights. The Task Force did not resolve these questions.

Next, the Task Force discussed Alternatives B, C, and D, which present several different ways for challenging instream flow rules. Alternative B would modify the process for challenging an instream flow rule by empowering a court which was hearing an instream flow rule challenge to take evidence outside the agency's rulemaking record (beyond what is currently authorized under the APA) and to make an independent decision regarding the substance of the rule. Alternative C would modify the process in the same way as modified under Alternative B, but the case would be filed in the Specialized Water Court rather than the general superior court. Alternative D would retain the status quo for instream flow rulemaking challenges (they would continue to be subject to existing APA standards governing the taking of evidence and the decision of the court). Alternative D would be applied by the general superior court or the Specialized Water Court, if one is created.

In discussing the topic of instream flow rule challenges, some Task Force members suggested: (1) the possibility of defining who has standing to bring such challenges in a manner different from how the APA currently approaches standing; (2) whether to change statutes of limitations applicable to instream flow rule challenges (currently there is a two year statute of limitations on procedural challenges to rules but there is no statute of limitation applicable to substantive rule challenges); and (3) whether to change upfront processes applicable to instream flow rulemaking, *e.g.*, by requiring more notice upfront (before a rule is proposed) or limiting the types of permissible changes between the proposed and adopted rule. The Task Force did not resolve these questions.

Next, the Task Force discussed Alternatives E and F, which present two different ways to protect senior instream flows from impairment by junior rights. Keith Phillips offered his opinion that, where flows are established by rule, any subsequent water right decision made by the Department of Ecology will be made subject to (or junior to) the flow rule. The department probably has the authority to enforce such conditions even after the *Rettkowski* ("*Sinking Creek*") case (122 Wn.2d 219 (1993)). Therefore, questions of protecting senior instream flows from impairment by junior rights will probably come up only in the context of a water right that has been transferred into trust for the benefit of an instream flow. In such case, the creation of the trust is intended to ensure that the quantity of water represented by the right be kept in the stream and not be removed by a junior user. Where the right exists in an adjudicated basin, the department may regulate the junior user to protect the senior trust right. However, where the right exists in an unadjudicated basin, the department lacks the authority to so regulate. Alternative E would authorize an administrative action by Ecology to protect a senior trust right in an unadjudicated basin. Alternative F would authorize Ecology to petition a superior court (or the Specialized Water Court if one is created) for an order protecting a senior trust right in an unadjudicated basin.

Each member received two votes and Attorney General Gregoire asked that each member cast one of their votes between Alternatives B, C, and D, and their second vote between Alternatives E and F. Voting results led to Task Force support of Alternatives D (9 votes) and F (8 votes). Alternative B received 1 vote, Alternative C received 2 votes, and Alternative E received 4 votes.

As a result of voting and subsequent discussions at the meeting, the Task Force agreed to include the following recommendations for addressing instream flow disputes:

D. The existing structure governing challenges to instream flows adopted by agency rule should be retained (challenge brought in court, pursuant to APA standards). If a Specialized Water Court is created, the instream flow rule challenge should be filed in that court. Subsequent discussion of the Task Force led to a decision to include a footnote in the Task Force report suggesting that the Legislature consider whether to authorize the court to take additional new evidence beyond what is currently allowed under RCW 34.05.562 in an instream flow rule challenge case.

F. Ecology should be authorized to petition the superior court (or the Specialized Water Court if one is created) for an order protecting an instream flow right that is based on a senior trust right in an unadjudicated basin.

An updated version of Worksheet #8, dated October 2003, second revision, has been modified to incorporate the discussion and decisions of the Task Force.

***Follow-up from May 22, July 24, September 30, and October 22 decisions***

A Summary of Preliminary Recommendations of the Task Force as of October 22, 2003 was distributed to all members. Members were asked to provide comments to Assistant Attorney General Mary Sue Wilson by October 30, 2003. On October 23, Ms. Wilson distributed an updated version of this document by e-mail. This updated version includes the results of Task Force deliberations on October 22, 2003.

***Plan for Review and Comment on Draft Task Force Report (Report to be distributed to members by November 5, 2003, comments due back by December 5, 2003)***

Attorney General's Office staff is preparing a draft report of the Task Force. The draft report will follow the structure and substance of the Summary of Preliminary Recommendations referenced above. This draft report will be distributed to Task Force members on or about November 5, 2003. Comments on this draft report should be submitted to the AGO by December 5, 2003. Because the Task Force has already agreed to its preliminary recommendations, comments on the draft report should focus on: (1) presentation/focus/structure of the report; (2) consistency with decisions made by the Task Force at its meetings (for reference see draft documents and meeting summaries); and (3) whether supporting detail/rationale for Task Force decisions is sufficient.

The draft report will be a public document and will be provided to members of the public who ask for a copy. If members of the public want to submit comments for Task Force consideration, the AGO will ask that they send their comments to the AGO by November 25, 2003. Copies of any comments received by that date will thereafter be distributed to all members of the Task Force.

***Thank yous and good-byes***

Attorney General Gregoire thanked the members of the Task Force for the time and energy they dedicated to the work of the Task Force. She also thanked staff that provided support to the Task Force. All Task Force members joined in a special recognition of Tammy Teeter for her administrative and refreshment support throughout the tenure of the Task Force.

***Discussion Points***

The final agenda item of the day required the Task Force to review a document entitled *Discussion Points*, October 22, 2003. Task Force members agreed with the approaches suggested in items 1-4 of the Discussion Points.

The Task Force devoted some time to discussing the issue presented by Discussion Point #5, whether Senate confirmation should be required for judges appointed by the Governor to the Specialized Water Court. During this discussion, the issue of whether these judges should run for election in a retention election or a contested election was revisited. The Task Force was reminded that members had already decided to recommend retention election (*see* July 24, 2003 Task Force Meeting Summary at page 6). At the conclusion of the discussion, it was decided by the Task Force that the Recommendations include a footnote indicating that a minority of Task Force members supported a provision for Senate confirmation of Specialized Water Court judges. The footnote will explain the reasons that Senate confirmation was urged.

Next, the Task Force discussed item #6 of the Discussion Points. Item #6 focuses on the Task Force's plan to recommend that the Legislature examine the feasibility of an administrative title system that would aim to validate water rights short of an adjudication and keep them up to date after an adjudication. The Task Force agreed that this recommendation should be stated as generally as possible since the Task Force has not studied this topic to a degree that allows endorsement of any particular option. Therefore, the report will recommend that the Legislature further study and examine the feasibility of an administrative title system that would aim to validate water rights before a basin is adjudicated and that would keep water rights up to date after an adjudication. Ideas that the Task Force urges the Legislature to consider include, but are not limited to: (1) a process aimed at validating water rights; (2) a process aimed at enhanced agency record-keeping; and (3) a "title insurance"-type system. The Task Force report should suggest that the Legislature be educated about the *Torrens Act* (a state law for real property) before making any final decisions on this topic as experience under that act may provide information regarding how similar legislation has or has not worked in the real property context.

*The meeting adjourned at approximately 4:30 p.m.*

# *Appendix*

## *C*

# *Proposed Scoping Table*

TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
<p><b>#1</b></p> <p>Historic Claim Disputes</p>	<p>Disputes involving a water right claimant who does not hold a permit or certificate because the claim pre-dates adoption of the water code. The claim is filed in the state claims registry.</p> <ul style="list-style-type: none"> <li>A tentative determination of the validity of these rights occurs if the right holder seeks to change the right. The tentative determination is subject to challenge in a PCHB appeal.</li> <li>A final determination of the validity of these rights occurs in a superior court general adjudication.</li> <li>An Ecology regulatory action issued to a water right claimant for invalid water use is subject to challenge in a PCHB appeal.</li> </ul>	<ul style="list-style-type: none"> <li>Annual average number of PCHB WR cases = 83; approximately 10% are appealed to superior court or higher. These include the types of PCHB cases described under historic claim, instream flow, water rights management, and water rights enforcement categories.</li> <li>Only 1 general adjudication (Yakima basin) is currently underway. Many of the rights at issue in this adjudication are reflected by historic claims.</li> <li>Statewide, there are an estimated 169,000 historic claims, the large majority of which are unadjudicated. [note: unadjudicated does not necessarily = "in dispute."]</li> <li>These 169,000 historic claims represent a huge volume of water.</li> <li>_____.</li> <li>_____.</li> </ul>	<p>Yes</p> <p>May 22nd</p>
<p>Federal &amp; Indian Reserved Rights Disputes</p> <p><i>Task Force deferring consideration pending AGO discussion with federal government.</i></p>	<p>Disputes concerning the existence, validity and/or scope of a federal or Indian reserved water right.</p> <ul style="list-style-type: none"> <li>These disputes may be addressed in a federal court action or in a state court general adjudication that satisfies the McCarran Amendment.</li> </ul>	<ul style="list-style-type: none"> <li>Total number of cases not large, but workload and costs associated with cases addressing these cases is high. Expect more cases/disputes in the future.</li> <li>Impact of these rights is significant: in a given watershed, these rights are frequently the most senior; if not resolved, the junior right holders and water managers lack certainty regarding availability of water for others; if resolved, result may be to limit exercise of junior rights.</li> <li>Legislature has considered this topic in recent sessions; appears ripe.</li> <li>Options that state can develop are limited by McCarran Amendment requirements.</li> <li>_____.</li> </ul>	<p>Yes</p> <p>Sept 18th</p>

TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
<b>#2</b> Water Rights Management Disputes	<p>Disputes involving Ecology decisions to approve or deny applications for new water rights or applications to change or amend existing water rights; disputes involving relinquishment orders; disputes involving decisions to cancel permits.</p> <ul style="list-style-type: none"> <li>Ecology permit decisions, and relinquishment and cancellation decisions are subject to challenge at the PCHB.</li> </ul> <p>Disputes involving priority of water rights across single watershed.</p> <ul style="list-style-type: none"> <li>A final determination of the validity and priority of water rights occurs in a superior court general adjudication.</li> </ul>	<ul style="list-style-type: none"> <li>Annual number of PCHB WR cases = 83; approximately 10% are appealed to superior court or higher. These include the types of PCHB cases described under historic claim, instream flow, water rights management, and water rights enforcement.</li> <li>PCHB viewed favorably by some as specialized expert; viewed by others as not adequately sensitive to local concerns. [2003 SSB 5086 presents this debate]</li> <li>Only 1 general adjudication (Yakima basin) is currently underway.</li> </ul> <p>Adjudication viewed as large, slow and costly. Issue of whether there are alternatives to general adjudication appears ripe. [see AGO/Ecy Report on Streamlining Adjudications]</p>	<p>Yes</p> <p>July 24th</p>
<b>#3</b> Water Rights Enforcement Disputes  <i>Task Force may divide into two subcategories:</i> <i>a) single water users enforcement; and</i> <i>b) Basin-wide enforcement.</i>	<p>In all watersheds, these disputes involve enforcement of the terms of permits or certificates and illegal water use (water use not covered by permit or permit exemption); in watersheds that have been adjudicated, these disputes also involve enforcing the terms of the court's final decree.</p> <ul style="list-style-type: none"> <li>Ecology enforcement decisions are subject to challenge at the PCHB.</li> <li>While adjudication is pending, superior court has jurisdiction over enforcement.</li> </ul>	<ul style="list-style-type: none"> <li>Annual number of PCHB WR cases = 83; approximately 10% are appealed to superior court or higher. These include the types of PCHB cases described under historic claim, instream flow, water rights management, and water rights enforcement.</li> <li>PCHB viewed favorably by some as specialized expert; viewed by others as not adequately sensitive to local concerns. [2003 SSB 5086 presents this debate]</li> <li>_____.</li> <li>_____.</li> <li>_____.</li> <li>_____.</li> </ul>	<p>Yes</p> <p>July 24th</p>

TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
<p><b>#4</b></p> <p>Instream Flow Disputes</p>	<p>Disputes involving the setting of an instream flow and disputes involving whether a particular water right is subject to an instream flow.</p> <ul style="list-style-type: none"> <li>Instream flows applicable basin-wide are established by rule. Instream flow rules are subject to challenge in superior court pursuant to the APA.</li> <li>Instream flow conditions may be included in individual permit decisions. Such conditions are subject to challenge in a permit appeal to the PCHB.</li> <li>Ecology may bring a regulatory action to restrict water use based on a flow condition included in a water right. These actions may be appealed to the PCHB.</li> </ul>	<ul style="list-style-type: none"> <li>In recent years, Ecology has adopted only a few new instream (ISF) flow rules. In recent years, no superior court APA ISF rule challenges have been filed.</li> <li>Watershed planning efforts that will address instream flows are underway in 33 watersheds. These efforts are projected to result in the adoption of new ISF rules in 23 watersheds by 2010. Each new rule could be the subject of a superior court APA challenge. Watershed planning aims to involve all local interests in developing ISFs. If these efforts are successful, we may see only a few legal challenges.</li> <li>Permits containing stream flow conditions are occasionally subject to challenge. These numbers are not separately tracked by the PCHB.</li> <li>ISF issues are closely related to tribal water/fisheries claims; if tribal water rights are considered by Task Force, ISF issues should probably also be considered.</li> <li>This may be a unique category because flow issues involve questions of science.</li> <li>_____.</li> </ul>	<p>Yes</p> <p>September 18th</p>
<p>Two-Party Disputes (or private small-scale disputes)</p>	<p>Disputes between individuals concerning the validity or seniority of their rights; including disputes where one right holder alleges impairment from another right holder's use of water.</p> <ul style="list-style-type: none"> <li>In <i>Rettkowski v. Ecology</i> ("Sinking Creek"), 122 Wn.2d 219 (1993) the Supreme Court determined that Ecology lacked authority to issue orders addressing priorities among competing water rights; under the water code, priorities are addressed only in a general adjudication.</li> <li>As between two parties, a quiet-title or DJA may be brought to resolve disputes. In these actions, the state is not a party.</li> </ul>	<ul style="list-style-type: none"> <li>Uncertain re number of cases; Ecy/AGO learn about 1-2 cases per year; these cases could become more common in future as water becomes more scarce.</li> <li>Ecy/AGO's perception is that need for new system is relatively low.</li> <li>Do we want/need state involvement beyond court system in disputes that are essentially private disputes? Is our answer different for disputes that are truly 2 party disputes and those that are small scale, multi-party disputes?</li> <li>_____.</li> <li>_____.</li> </ul>	<p>No</p>



April 24, 2003

Revised PROPOSED SCOPING TABLE

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TYPE OF DISPUTE	DESCRIPTION OF DISPUTES & CURRENT PROCESS FOR ADDRESSING DISPUTE	APPLICATION OF CRITERIA <i>Criteria: number of cases annually? what is cost to state of not solving this problem ? perceived need for fix? appropriate topic for state to address? others?</i>	PROPOSE FURTHER ANALYSIS BY TASK FORCE?
Interstate or International Disputes	<p>These disputes involve water bodies shared between two states or two nations. Washington shares water bodies with Oregon, Idaho, and Canada.</p> <ul style="list-style-type: none"><li>• Congressional authorization required to negotiate international agreement. Congressional approval required to approve Treaty.</li><li>• Officially, congressional authorization required for formal interstate compacting. In practice, states frequently negotiate informal compacts.</li></ul>	<p>A January 2003 Ecology draft report executive summary describes existing agreements between Washington and Oregon, Idaho, and Canada. The report concludes that no additional agreements are required at this time. The Spokane-Rathdrum Aquifer is the shared water body receiving the most attention recently. Washington and Idaho are working together to obtain funding for a comprehensive study of the aquifer.</p> <ul style="list-style-type: none"><li>• Unique character of these disputes.</li><li>• Systems already exist to address these disputes; state is limited in its capacity to create new interstate or international system.</li><li>• Facts (recent study) do not show immediate need.</li><li>• _____.</li></ul>	No

*Working Document: Existing Processes  
and Possible Alternatives*

EXISTING PROCESS	COVERS THESE DISPUTES	ALTERNATIVE PROCESSES (minor changes) <sup>1</sup>	ALTERNATIVE PROCESSES (major changes)
<p><b>ECOLOGY/PCHB ACTIONS</b></p> <p>Ecology makes decision, decision may be appealed to PCHB. PCHB conducts <i>de novo</i> hearing. PCHB decision may be appealed to superior court and higher.</p> <ul style="list-style-type: none"> <li>Some historic claim disputes</li> <li>Some instream flow disputes</li> <li>Some water rights management disputes</li> <li>Some water rights enforcement disputes</li> </ul> <p><b>To be discussed at July 24<sup>th</sup> meeting</b></p>	<p>Disputes involving Ecology decisions: to approve or deny applications for new water rights or applications to change or amend existing water rights; disputes involving relinquishment orders; disputes involving decisions to cancel permits; enforcement of the terms of permits or certificates and illegal water use (water use not covered by permit or permit exemption); if watershed has been adjudicated, these disputes also involve enforcing the terms of the court's final decree.</p> <p>Average number of PCHB water right cases per year = 83</p>	<p>(1) <i>Modify the process associated with how Ecology makes any of these decisions.</i></p> <p>(2) <i>Modify PCHB process or standards; e.g., change standard of review, change hearing process.</i></p> <p>(3) _____.</p> <p>(4) _____.</p>	<p>(1) <i>Agency other than Ecology makes initial decision for any of these categories.</i></p> <p>(2) <i>Appeals of WR decision (whether made by Ecology or new agency) go directly to superior court or court of appeals, i.e., eliminate role of PCHB.</i></p> <p>(3) _____.</p> <p>(4) _____.</p>
<p><b>SUPERIOR COURT APPEALS OF PCHB DECISIONS</b></p> <p>Continuation of above process. Review is conducted according to APA standards.</p> <p><b>To be discussed at July 24<sup>th</sup> meeting</b></p>	<p>Covers same disputes as described above.</p> <p>Estimated total number:</p> <p>Superior Court appeals from PCHB WR decisions: 8-9 per year over past 11 years.</p> <p>Court of Appeals: approximately 5 per year.</p> <p>Supreme Court: approximately 1 per year.</p>	<p>(1) <i>Modify standard of review applicable to superior court review of PCHB decision.</i></p> <p>(2) _____.</p> <p>(3) _____.</p> <p>(4) _____.</p>	<p>(1) <i>Create specialized water judge positions among superior court judges. Jurisdiction might include jurisdiction to make decisions (i.e., serve role currently served by Ecology) or jurisdiction to review decisions (i.e., serve role currently played by PCHB) or jurisdiction to hear review from PCHB decision (i.e., serve same function as superior court currently serves).</i></p> <p>(2) <i>Create statewide water court. Jurisdiction choices same as in number (1).</i></p> <p>(3) _____.</p> <p>(4) _____.</p>

<sup>1</sup> Each numbered change is intended to be separate and distinct, but processes can be combined where appropriate.

EXISTING PROCESS	COVERS THESE DISPUTES	ALTERNATIVE PROCESSES (minor changes) <sup>2</sup>	ALTERNATIVE PROCESSES (major changes)
<p><b>GENERAL ADJUDICATIONS IN SUPERIOR COURT</b></p> <ul style="list-style-type: none"> <li>Some historic claim disputes</li> <li>Some federal and Indian reserved rights disputes</li> <li>Some water rights management disputes</li> <li>Enforcement disputes while adjudication is pending</li> </ul> <p><b>To be discussed at May 22<sup>nd</sup> meeting</b></p>	<p>Disputes involving priority of water rights across single watershed. A final determination of the validity and priority of water rights may occur only in a superior court general adjudication.</p> <p>Disputes concerning the existence, validity and/or scope of a federal or Indian reserved water right.</p> <p>Only 1 adjudication in process, it was filed in 1977.</p>	<p>(1) <i>Within the adjudication process, have Ecology make the tentative determinations on water rights and have claimants present fully documented claims at the outset.</i></p> <p>(2) <i>Independent of the adjudication process, create a new process for Ecology to validate registered water right claims.</i></p> <p>(3) <i>Allow limited special adjudications.</i></p> <p>(4) <i>Have Ecology provide comprehensive background information early in the adjudication proceedings.</i></p> <p>(5) <i>Authorize pre-filed written testimony.</i></p> <p>(6) <i>Utilize information technology more effectively.</i></p> <p>(7) <i>Develop aerial photograph interpretation expertise.</i></p> <p>(8) <i>Expand the use of mediation.</i></p> <p>(9) <i>Develop guidance on how to maintain and document a water right.</i></p> <p>(10) <i>More aggressive watershed planning. Modify current 90.82 process to expand mission of group to directly address watershed-wide water right priorities.</i></p> <p>(11) <i>More aggressive prioritizing/funding: establish priorities for conducting general stream adjudications in priority basins.</i></p> <p>(12) <i>Post adjudication tracking of water rights.</i></p> <p>(13) _____.</p>	<p>(1) <i>Create specialized water judge positions among superior court judges. Jurisdiction might include conducting basin-wide or focused adjudications according to legislatively established priorities.</i></p> <p>(2) <i>Create Water Court: Jurisdiction might include conducting statewide adjudication or focused adjudications.</i></p> <p>(3) <i>Create Entity like Montana's Compact Commission to negotiate with federal agencies and tribes.</i></p> <p>(4) <i>Two water courts (East &amp; West) to adjudicate claims/basins.</i></p> <p>(5) <i>Adjudication of rights "one at a time."</i></p> <p>(6) <i>Employ "fact finding" process.</i></p> <p>(7) <i>Adjudicate both ground water and surface water.</i></p>

<sup>2</sup> Each numbered change is intended to be separate and distinct, but processes can be combined where appropriate.

EXISTING PROCESS	COVERS THESE DISPUTES	ALTERNATIVE PROCESSES (minor changes) <sup>3</sup>	ALTERNATIVE PROCESSES (major changes)
<b>ORIGINAL SUPERIOR COURT ACTIONS</b> <ul style="list-style-type: none"> <li>Two-party disputes (some involve state as party; some do not)</li> <li>Some instream flow disputes</li> </ul>	<ul style="list-style-type: none"> <li>Two party, private water rights disputes (state is not a party). Numbers not tracked. Estimated 1-5 per year.</li> <li>Declaratory judgment action where state is a party. Roughly one case filed per year.</li> <li>APA rule challenge to instream flow rule adopted by Ecology.  Less than one case per year of this sort is filed. May see increase in future.</li> </ul>	<p>(1) See recommendation # 3 from Streamlining Adjudications Report (Allow limited special adjudications).</p> <p>(2) Create new role for PCHB or another agency to assist or expedite two party disputes.</p> <p>(3) _____.</p> <p>(4) _____.</p>	<p>(1) WR rule challenges heard by PCHB instead of superior court.</p> <p>(2) _____.</p> <p>(3) _____.</p>
<b>ORIGINAL FEDERAL COURT ACTIONS</b> <ul style="list-style-type: none"> <li>Federal and Indian reserved rights disputes</li> <li>Interstate disputes</li> </ul>	<p>Disputes concerning the existence, validity and/or scope of a federal or Indian reserved water right.</p> <p>Less than one case filed per year. Case involves significant resources.</p>	<p>(1) Ad hoc mixing of litigation and negotiations as cases arise, with federal court action continuing to provide the legal overlay.</p> <p>(2) More aggressive watershed planning. Modify current 90.82 process to expand mission of group to directly address federal and tribal water right claims.</p> <p>(3) More aggressive prioritizing/funding: establish priorities for resolution of federal and tribal water right issues, obtain funding to pursue general stream adjudications in priority basins. Within these adjudications, prioritize negotiations with federal agencies and tribes.</p> <p>(4) _____.</p> <p>(5) _____.</p>	<p>(1) Establish water court, set in motion adjudications across state.</p> <p>(2) Establish compact commission type agency to negotiate federal and tribal water rights (may need adjudication to be successful).</p> <p>(3) Even more aggressive watershed planning. Modify current 90.82 process to expand mission of group to directly address federal and tribal water right claims AND other claims within the basin and to include a process to enter consent decree documenting comprehensive agreement.</p> <p>(4) _____.</p> <p>(5) _____.</p>

<sup>3</sup> Each numbered change is intended to be separate and distinct, but processes can be combined where appropriate.

***Historic Claims Disputes/Superior  
Court General Adjudications  
Work Sheet #1***

## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, **Revised: June, 2003** Work Sheet #1

Historic Claims Disputes	Superior Court General Adjudications	Strengths of Superior Court General Adjudication System (supplemented by discussion at May 2003 meeting)	Weaknesses of Superior Court General Adjudications System (supplemented by discussion at May 2003 meeting)	Criteria for Success (identified by Task Force 6/02 meeting; (supplemented by discussion at May 2003 meeting)
<p>Historic claims are those claims to surface water rights that pre-date the Surface Water Code (1917) and those claims to groundwater that pre-date the Ground Water Code (1945). Water uses pre-dating the codes do not require a permit, but in 1967 the Legislature required that claimants to these pre-code rights file administrative statements of claim to preserve these pre-code rights. There have been four open periods for filing claims in the claims registry: 1969-1974; 1979; 1985; and 1997-1998. If a statement of claim was required and a claim was not filed, the right is considered relinquished. Under Washington water law, to maintain a water right it must be put to continuous beneficial use unless a period of non-use is excused by an exception to this use requirement. <i>See, e.g.,</i> RCW 90.14.020(3); 90.14.160; 90.14.170; 90.14.180. There are an estimated 170,000 registered water right claims in Washington, most have not been adjudicated, <i>i.e.,</i> confirmed to represent valid rights, with defined quantity limits and priority dates.</p>	<p>A general adjudication of water rights in Washington is conducted according to procedures provided in the Water Code. RCW 90.03.105 through 90.03.245 and 90.44.220. In a general adjudication, the court determines the validity, extent, and relative priorities of existing water rights for a specific basin, surface water body, or ground water body. For more details, see <i>2002 Report to the Legislature: Streamlining the Water Rights General Adjudications Procedures</i>; December 2002, Ecology Publication No. 02-11-019 at pages 5-7 (Report with blue cover). Issues regarding whether a historic claim represents a valid right, and, if so, what the quantity and priority of that right is are decided in a superior court general adjudication. Given the requirement of continuous beneficial use, determining the validity of a water right involves examining the entire history of the claimed right. Thus, a court conducting an adjudication in 2003 charged with determining whether a claim asserting a surface water right dating back to 1910 represents a valid water right will examine the entire history of the use of that water right, beginning in 1910 and continuing to 2003.</p>	<ul style="list-style-type: none"> <li>• End result provides complete legal certainty among water users. This certainty facilitates future water management and enforcement. [certainty lasts only for a period of time, as there is no provision for ongoing updates]</li> <li>• The decree also provides reliable documentation as to the extent of water rights appurtenant to property, and can facilitate sales of land and development of markets for transfers of water rights.</li> <li>• Because the local superior court serves as the forum, there is relatively easy access to local citizens.</li> <li>• Involves agency, including its expertise and resources (<i>e.g.,</i> providing reports to the court and providing referee to conduct some hearings) in the process.</li> <li>• Allows for voluntary participation in ADR processes.</li> <li>• Provides for interim regulation of water rights by the superior court during the pendency of the adjudication.</li> <li>• Ability to address federal reserved water rights</li> </ul>	<ul style="list-style-type: none"> <li>• The larger the water body, the longer and more complex the adjudication. (Costly/time-consuming).</li> <li>• Existing structure may allow claimants too many opportunities to provide evidence supporting their claims (<i>e.g.,</i> exceptions process).</li> <li>• Entire water body or basin is adjudicated at one time, makes for lengthy processes; may be more comprehensive than necessary if actual disputes involve only part of water body.</li> <li>• Does not mandate mediation or other ADR.</li> <li>• Process is too complex for small claimants, including those that represent themselves without legal counsel. [although this has been accommodated to some extent in ongoing Yakima case]</li> <li>• Surface Water Only</li> <li>• Cost</li> <li>• No follow-up: adjudication provides only a snapshot</li> <li>• Inexperience of claimants necessitates more "bites at apple"</li> <li>• Difficult to build historical knowledge/experience because same court does not hear all adjudications (<i>i.e.,</i> Yakima County Superior Court is hearing current adjudication, but its expertise will not be used if next adjudication is filed in WallaWalla county).</li> </ul>	<ul style="list-style-type: none"> <li>• Cost: for both participants and the public.</li> <li>• Unified system (which is able to cover all types of water, <i>e.g.,</i> ground water, surface water, rain water).</li> <li>• Sufficient data to make process work (finite character of water resources)</li> <li>• Recognizes limitations of interests and authorities of other jurisdictions (<i>e.g.,</i> other states, tribes, federal government claims).</li> <li>• Appropriately comprehensive.</li> <li>• Builds institutional memory/experience.</li> <li>• Provides access to all, especially pro se parties.</li> <li>• Built-in system of prioritization.</li> <li>• Timely &amp; efficient.</li> <li>• Just &amp; balanced.</li> <li>• Certainty about its scope (<i>e.g.,</i> does it cover interstate issues or not?).</li> </ul>

***Historic Claims Disputes/Superior  
Court General Adjudications  
Work Sheet #2***



## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, Revised June 2003, Work Sheet #2

Alternatives	Description	Comments (from 5/22/03 discussion)	Ranking
<p>(A) Comprehensive background information developed early in process, claimants present fully documented claims at outset, and Ecology makes tentative determinations on water rights.</p> <p>11 votes tied for 1st</p>	<p>This alternative combines <i>Streamlining</i> Recommendations #1 &amp; #4. The basic structure of the existing general adjudication system is retained, but the alternative employs measures aimed at reducing court time associated with adjudicating claims.</p> <ul style="list-style-type: none"> <li>Would require funding for these activities; court time and money savings may be shifted to Ecology.</li> </ul>	<p>(1) Background Information (2) Tentative Determination(s)/Recommendation (?)</p> <p>additional notes:</p> <ul style="list-style-type: none"> <li>Deference to agency? (no)</li> <li>Fact Collection</li> <li>Screening – disputed &amp; non-disputed                             <ul style="list-style-type: none"> <li>Disputed sent on with issues identified</li> <li>Non-disputed: ratified by court</li> </ul> </li> </ul> <p>Voluntary or Mandatory? Provide referee with mediation or settlement authority? Mandatory only in sense that judge can order it? Create incentives to mediate (earlier resolution)? Occurs within context of court proceeding?</p>	<p>#1 (tied with F)</p>
<p>(B) Expand the use of mediation. (As a concept)</p> <p>9 votes 2<sup>nd</sup> place</p>	<p>This alternative, by itself, also retains the existing structure. Increased use of mediation is expected to expedite decision-making and reduce court time.</p> <ul style="list-style-type: none"> <li>Would require funding.</li> </ul>	<p>Voluntary or Mandatory? Provide referee with mediation or settlement authority? Mandatory only in sense that judge can order it? Create incentives to mediate (earlier resolution)? Occurs within context of court proceeding?</p>	<p>#2</p>
<p>(C) Authorize pre-filed written testimony within the adjudication.</p> <p>5 votes 4<sup>th</sup> place</p>	<p>This alternative is described as <i>Streamlining</i> Recommendation #5. This alternative also aims to expedite judicial decision-making within the existing structure.</p>	<p>Rebuttal opportunity</p> <p>Variations: Direct done by pre-filed; cross-exam/redirect done live</p>	<p>#4</p>

## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, Revised June 2003, Work Sheet #2

Alternatives	Description	Comments (from 5/22/03 discussion)	Ranking
<p>(D) Employ “fact finding” process.</p> <p>Short hearing – “offer of proof” type hearing.</p>	<p>This alternative was suggested during March 2003 meeting. Proponent may elaborate on concept. Appears to leave existing structure intact.</p>	<p>Purpose of early fact finding would be to establish something like “reasonable cause” early in process to justify moving potentially valid claims forward and weeding out baseless claims.</p> <p>Task Force decided to make this concept part of Alternative A.</p>	<p>received no votes</p>
<p>(E) Independent of the adjudication process, create a new process for Ecology to validate registered water right claims.</p> <p>Does not involve prioritizing claims.</p> <p>2 votes</p> <p>5<sup>th</sup> Place</p> <p>(decision to strike from recommendations)</p>	<p>This alternative is described as <i>Streamlining</i> Recommendation #2. It would exist independent of the general adjudication process. It could be employed whether or not other changes are made to the existing system.</p> <p>Ecology would determine the validity of an historic claim upon request. Ecology’s determination would be appealable to the PCHB. Ecology’s validation would be final, not tentative so questions of the validity of a particular claim would not have to await a full adjudication.</p>	<p>Does not have to be Ecology that performs validation; could be other agency or a court.</p> <p>Focus is on one right at a time.</p> <p>Concern about persons who might have an interest but who would not be a party or receive notice of the validation proceeding.</p>	<p>#5</p>
<p>(F) Allow limited special adjudications. (geographically limited)</p> <p>11 votes</p> <p>tied for 1<sup>st</sup></p>	<p>This alternative is described as <i>Streamlining</i> Recommendation #3. It would authorize adjudication of rights among a limited number of claimants or for stream reaches or limited groundwater areas, rather than entire basins.</p>	<p>Issues regarding federal rights (McCarran Amendment won’t allow inclusion of federal rights in proceeding not sufficiently comprehensive)</p> <p>Clearly identify the parties involved</p> <p>Need to clarify authority in water code</p>	<p>#1 (tied with A)</p>

## HISTORIC CLAIMS DISPUTES/SUPERIOR COURT GENERAL ADJUDICATIONS

Water Rights Disputes Task Force, **Revised June 2003**, Work Sheet #2

Alternatives	Description	Comments <b>(from 5/22/03 discussion)</b>	Ranking
<p><b>(G) Mandate that all adjudications address both surface and ground water where appropriate.</b></p> <p><b>1 vote</b></p> <p><b>6<sup>th</sup> place</b></p> <p><b>(decision to strike from recommendations)</b></p> <p><b>(H) Modify watershed planning statute (90.82) to expand the responsibilities of the planning group to include facilitating basin-wide water apportionment agreements.</b></p> <p><b>(decision to strike from recommendations)</b></p>	<p>This alternative was suggested during the March 2003 meeting.</p> <p>This alternative would charge planning groups with facilitating water apportionment agreements. A final apportionment agreement would be entered as consent decree in court and be final and binding as is a final decree from an adjudication court.</p>	<p>Discussed possible rewrite of this to require court to make determination at outset whether adjudication should encompass both surface and ground water. If such a requirement was adopted by statute, Legislature might identify criteria to be considered by court in making determination.</p> <p>Discussed whether court's decision would be subject to interlocutory review.</p> <p>May not work if all persons impacted don't agree.</p>	<p><b>#6</b></p> <p><b>received no votes</b></p>
<p><b>(I) Create specialized water court, or water judge positions, designed and funded to process water right disputes.</b></p> <p><b>Jurisdiction of court(s)/judges would need to be determined:</b></p> <p><b>Basin-wide or focused adjudications? Appeals from PCHB water resources cases?</b></p> <p><b>7 votes</b></p> <p><b>3<sup>rd</sup> place</b></p>	<p>This alternative could involve:</p> <ul style="list-style-type: none"> <li>- single water court with statewide jurisdiction</li> <li>- two water courts, one with jurisdiction in eastern Washington, one with jurisdiction in western Washington; or</li> <li>- specialized water judge positions throughout the state (<i>e.g.</i>, one water judge serves every 6 counties)</li> </ul>	<ul style="list-style-type: none"> <li>• <b>Funding</b></li> <li>• <b>Separate body (Admin or Judicial)</b></li> <li>• <b>consider McCarran Amendment impacts</b></li> <li>• <b>2 new water courts</b></li> <li>• <b>Possible constitutional restrictions</b></li> <li>• <b>Possible political ramifications (<i>e.g.</i>, judge elected in one county but serves multiple counties; loss of local access)</b></li> <li>• <b>Resource impacts</b></li> </ul>	<p><b>#3</b></p>

***Water Right Management & Enforcement  
Disputes/PCHB-Courts via APA Process  
Work Sheet #3***

# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, Revised August 2003 Work Sheet #3

Page 1 of 1

Water Rights Management and Enforcement Disputes	Description of the PCHB-Courts via APA Process	Strengths of PCHB-Courts via APA Process (supplemented by discussion at July 2003 meeting)	Weaknesses of PCHB-Courts via APA Process (supplemented by discussion at July 2003 meeting)
<p>Ecology decisions: approving or denying applications for (1) new water rights and applications for (2) changes to existing water rights. Challenges to these decisions may include a challenge to conditions included in Ecology decision.</p> <p>Ecology decisions: (3) canceling water right permits that have not been developed using due diligence or according to permit terms; and (4) relinquishing water rights based on non-use.</p> <p>Ecology (5) orders and penalties (<i>i.e.</i>, enforcement actions) that address use of water in violation of the terms of a permit, certificate, or claim or that address illegal water use (use not authorized by a permit, certificate, claim, or statutory permit exemption). Ecology orders that address (6) water shortages in adjudicated basins (these orders reduce diversions by junior water right holders to ensure availability of water for senior right holders). Ecology lacks authority to issue similar orders in basins that have not been adjudicated. <i>Rettkowski v. Ecology</i> (“Sinking Creek”), 122 Wn.2d 219, 858 P.2d 232 (1993).</p>	<p>Under current law, all of these Ecology “water right management and enforcement” decisions are subject to appeal to the Pollution Control Hearings Board (PCHB). A party who is not satisfied with the decision of the PCHB may appeal the PCHB decision to the superior court and/or appellate courts pursuant to the Administrative Procedures Act (APA), RCW ch. 34.05.</p> <p>The PCHB process is <i>de novo</i>. This means that the PCHB conducts a full evidentiary hearing with each party given an opportunity to present testimony and evidence supporting his/her case. The PCHB makes factual and legal conclusions without giving any deference to Ecology’s decision. Ecology has the burden of proof in penalty and regulatory order cases. Appellant has the burden of proof in other cases.</p> <p>Superior court APA review of the PCHB decision involves review of the PCHB record and generally does not involve taking new evidence. The superior court (and higher courts) review questions of law, including constitutional questions, on a <i>de novo</i> basis.</p> <p>On average, 83 water right cases are filed at the PCHB each year. Approximately 10% (~8-9) are appealed to superior court, with less than half of those going on to the appellate courts.</p>	<ul style="list-style-type: none"> <li>As a single forum, the PCHB develops <b>expertise</b> in a specialized area and applies this expertise to nearly all water cases (other than adjudications) that are brought in Washington, thereby facilitating <b>consistency</b> in case decisions.</li> <li>Decisions of the PCHB are indexed and most are available electronically. This is helpful to attorneys and parties with access to the internet.</li> <li>No filing fee is required to initiate a PCHB appeal.</li> <li>Mediation services are provided free of charge.</li> <li>Procedural assistance, especially beneficial to pro se parties, is available free of charge.</li> <li>In order to assist unrepresented parties, the PCHB has the ability to waive procedural requirements except those related to jurisdiction.</li> <li>Budget permitting, the PCHB travels to the locality of a dispute to conduct the hearing on the merits; the PCHB conducts many preliminary conferences and hearings over the phone.</li> <li>The PCHB has a goal to resolve cases within 6 months of filing. Evidence indicates that this goal is met in a majority of cases and that this is much quicker than <i>de novo</i> resolution by a court would be.</li> <li>The APA review process minimizes the amount of time general superior court judges devote to becoming familiar with the specialized area of water law. This probably expedites judicial resolution.</li> <li><b>Appointment process</b></li> </ul>	<ul style="list-style-type: none"> <li>PCHB proceedings are quasi-judicial. This formal, court-like setting (<i>e.g.</i>, with deadlines and motion practice) can be <b>intimidating</b> for unrepresented appellants. Many unrepresented parties expect the hearing to be similar to city council hearings and are surprised to find they must present evidence and cross-examine witnesses.</li> <li>As a single forum located in Olympia, the PCHB may be viewed as not sufficiently responsive to, or in touch with, local concerns and/or <b>too removed from the locality of the dispute</b>. Especially given budget constraints, this may become more of an issue as travel for hearings is restricted.</li> <li>As an agency of the state, parties may be discouraged from bringing appeals because they anticipate the PCHB will rubber stamp Ecology decisions or because they don’t view the PCHB as an entity separate and independent from Ecology.</li> <li>APA review standards mean that the superior court does not conduct a <i>de novo</i> review of factual issues and instead reviews the PCHB record. (Although there are some limited exceptions allowing the court to take new evidence). Litigants may desire an evidentiary hearing in front of their local superior court. Of course, this would add time and expense.</li> <li><b>Potential conflict(s) of interest, equity issues-related to the rendering of assistance by PCHB staff.</b></li> <li><b>Appointment process</b></li> <li><b>Potential establishment of policy via adjudication by 2 administrative agencies before going to court.</b></li> </ul>

***Water Right Management & Enforcement  
Disputes/Alternatives to PCHB-Courts  
via APA Process  
Work Sheet #4***

# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/ALTERNATIVES TO PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, **Revised August 2003** Work Sheet #4

Alternatives	Description	Comments	Ranking
		<b>This option eliminated before Task Force voting on July 24, 2003.</b>	<b>None</b>
<b>B. Create a New Quasi-Judicial Administrative Body to Handle all WR Management and Enforcement Appeals</b>  <b>0 VOTES</b>	<p>This alternative removes from the PCHB jurisdiction over appeals from Ecology WR decisions. A new quasi-judicial entity is created and given jurisdiction over appeals from Ecology WR decisions. This new entity might look like the Shorelines Hearings Board (SHB), which is charged with jurisdiction over only one subject matter, shoreline decisions. The makeup of this new "WR appeals board" could be similar to the makeup of the SHB, including members of the PCHB and representatives of local interests. For administrative convenience, this new agency could be made part of the Environmental Hearings Office.</p>	<p><b>This option eliminated when it did not receive any votes.</b></p>	<b>None</b>
<b>C. Modify Standard of Review Applicable to Superior Court Review of PCHB Decision</b>  <b>0 VOTES</b>	<p>Currently APA standards of review apply to superior court (and appellate court) review of PCHB decisions. PCHB factual determinations are reviewed based on the PCHB record but the superior court conducts a <i>de novo</i> review of all legal, including constitutional, questions. Any of these standards could be changed or modified to provide more or less deference to the factual and/or legal conclusions of the PCHB. For example, the entire superior court appeal could be made <i>de novo</i>, so that the superior court conducts a new evidentiary hearing and enters new findings of fact and conclusions of law.</p>	<p><b>Second half of this option eliminated before Task Force voting on July 24, 2003.</b></p>	<b>None</b>
Alternatives	Description	Comments	Ranking
<b>D. Mandate or Authorize Automatic Direct Appellate Court Review of PCHB Decisions</b>	<p>When a PCHB decision is reviewed by an appellate court after having been reviewed by a superior court, the superior court's decision is superfluous as the appellate court directly reviews the PCHB decision. Currently, persons seeking review of a PCHB decision may ask for direct review by the court of appeals or the supreme court (thereby skipping over the superior court level). It is then up to the appellate court to decide whether to accept direct review.</p>	<p><b>This option not carried forward as a recommendation because it received only one vote.</b></p>	<b>None</b>

# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/ALTERNATIVES TO PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, **Revised August 2003** Work Sheet #4

<b>1 VOTE</b>	This option would either mandate direct appellate review or make direct appellate review automatic if an appellant so elected. This would eliminate the superior court step. As noted, less than 10 PCHB WR cases are appealed to superior courts and higher each year.		
E. Appeals of WR Management and Enforcement Decisions Go Directly to Superior Court (Eliminate Role of PCHB)	This alternative specifies that Ecology WR decisions are no longer appealable to the PCHB and instead are appealable directly to superior courts. If this alternative is proposed, the Task Force would need to identify the type of hearing (record review or full evidentiary hearing), and the standard of review (any deference to Ecology's factual and/or legal conclusions).	This option not carried forward as a recommendation because it received only two vote.	None
<b>2 VOTES</b>	As a result of Task Force discussion, this option modified to give appellant choice/option to go either to PCHB or superior court for de novo hearing.		
F. Create Specialized Water Court(s) to Hear Appeals From PCHB Decisions	This alternative directs that appeals of PCHB WR decisions be filed at the specialized water court(s). This could be the same court(s) charged with jurisdiction over general adjudications (per May recommendation).	This option will be carried forward as a Task Force recommendation. A subcommittee will work on refining this option.	#1
<b>7 VOTES</b>	This option could involve a change in deference (as with option J)		
Alternatives	Description	Comments	Ranking
G. Create Specialized Water Court(s) to Hear Appeals From Ecology Decisions (PCHB Role Eliminated)	This alternative is similar to alternative E, but rather than send appeals of Ecology WR decisions to any superior court, this alternative directs such appeals to specialized water court(s). This could be the same court(s) charged with jurisdiction over general adjudications (per May recommendation).	This option will be carried forward as a Task Force recommendation. A subcommittee will work on refining this option.	#3



# WATER RIGHT MANAGEMENT & ENFORCEMENT DISPUTES/ALTERNATIVES TO PCHB-COURTS VIA APA PROCESS

Water Rights Disputes Task Force, Revised August 2003 Work Sheet #4

<b>4 VOTES</b>		
<p>H. Provide authority to Ecology to address priority of uses in areas that have not been adjudicated.</p> <p>(“Sinking Creek” fix)</p> <p><b>1 VOTE</b></p>	<p>This alternative would authorize Ecology to address water shortages and disputes between water right holders in basins that have not been adjudicated. Ecology currently lacks this authority per <i>Rettkowski v. Ecology</i> (“Sinking Creek”), 122 Wn.2d 219, 858 P.2d 232 (1993).</p> <p>Granting authority to Ecology to <b>make tentative determinations regarding</b> water priority disputes might eliminate the need for general adjudications in some basins.</p>	<p>This option not carried forward as a recommendation because it received only one vote.</p> <p>None</p>
<p>I. Process &amp; Standards keep as current with some minor “tweeks,” including mandatory mediation</p> <p><b>6 VOTES</b></p>	<p>This alternative leaves intact the basic structure of the PCHB – courts via APA process; the Task Force will recommend some minor changes, including giving authority to PCHB to mandate participation in mediation for certain types of cases.</p>	<p>This option will be carried forward as a Task Force recommendation.</p> <p>#2 (tied with J)</p>
<p>J. Deference to superior court decision when appellate court reviews</p> <p><b>6 VOTES</b></p>	<p>This alternative leaves intact the basic structure of the PCHB – courts via APA process. However, in an appeal to the Court of Appeals or Supreme Court in a case that had been subject to APA review in Superior Court, the appellate courts would be required to give some degree of deference to the Superior Court’s conclusions.</p>	<p>This option will be carried forward as a Task Force recommendation.</p> <p>#2 (tied with I)</p>

# *Federal and Indian Reserved Water Rights*

## *Work Sheet #5*

## FEDERAL AND INDIAN RESERVED WATER RIGHTS

Water Rights Disputes Task Force, **Revised** September 2003, Work Sheet #5

Disputes Involving Federal and Indian Reserved Water Rights	Existing Processes: Superior Court General Adjudications, Federal Court Actions, Ad Hoc Negotiations and Indirect Processes	Strengths of the Existing Processes	Weaknesses of Existing Processes
<p>Federal and Indian reserved water rights are rights based on the legal principle first recognized in <i>Winters v. U.S.</i>, 207 U.S. 564 (1908), that when the United States acquires or sets aside land through reservation for some specific purpose, the federal government also reserves sufficient water to meet the purposes of the reservation. This doctrine applies both to Indian reservations and other federal reservations.</p> <p>The federal government asserts rights to water based on reservation principles in many contexts. <i>E.g.</i>, in the Yakima adjudication, reserved water right claims were filed by the U.S. Forest Service, the Department of Defense, and the U.S. Fish and Wildlife Service for many purposes, including domestic supply, stock-water, irrigation, power generation, dust abatement, fire protection, and wildlife habitat maintenance.</p> <p>When a treaty secures a “right to take fish at all usual and accustomed places,” tribes have claimed rights to minimum stream flows based on the principle that the right to take fish carries with it the right to have fish habitat protected from human caused degradation, including water diversions.</p>	<p>General adjudications of water rights in Washington are conducted according to procedures provided in the Water Code. In a general adjudication, the court determines the validity, extent, and relative priorities of existing water rights for a specific basin, surface water body, or ground water body. Under the federal McCarran amendment, the United States and Tribes may be named as defendants in a state court general adjudication. <i>See</i> AGO Federal and Indian Reserved Water Rights, October 2002, Report to the Legislature, particularly at 15 (chart depicting differences between state-based water rights and federal reserved water rights).</p> <p>In the context of state general adjudications, any party may voluntarily enter into negotiations regarding his/her claims.</p> <p>If the state does not initiate a general adjudication in state court, an action may be initiated in federal court to address issues involving federal and/or Indian reserved water rights.</p> <p>“Indirect processes” may resolve related issues in a way that reduces the need/pressure to formally resolve federal and/or Indian reserved water rights. These include: watershed planning efforts; actions under federal authorities such as the Clean Water Act or the ESA.</p>	<ul style="list-style-type: none"> <li>For general strengths related to the general adjudication process, see Worksheet # 1, Revised June 2003 (certainty, local forum, draws on agency expertise).</li> <li>With respect to federal and Indian water right disputes in particular: <ul style="list-style-type: none"> <li>A state court general adjudication provides a state forum capable of addressing federal reserved water rights claims; other state systems may run afoul of the McCarran Amendment;</li> <li>Across the west, voluntary “ad hoc” negotiations in the context of a state court general adjudication frequently prove successful, particularly where parties are willing to negotiate and resources (water and/or funding) make compromise possible;</li> <li>Federal court actions provide quicker resolution involving fewer parties;</li> <li>“Indirect processes” are less formal, but may relieve pressure/need to formally resolve direct issues.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>For general weaknesses related to the general adjudication process, see Worksheet # 1, Revised June 2003 (costly/time-consuming, claimants may have too many opportunities to prove their case, all claims in entire basin must be addressed, no mandatory mediation, process can be too complex for unsophisticated claimants, does not facilitate the building, and the transfer to other cases, of expertise).</li> <li>With respect to federal and Indian water rights disputes in particular: <ul style="list-style-type: none"> <li>To formally resolve issues in state system, a state court general adjudication, which can be a very large process (basin-wide), is required even if the parties only want to address federal and/or tribal rights;</li> <li>For a smaller case, you need to go to federal court, but a federal court action does not automatically involve private water users;</li> <li>“Indirect processes” are not predictable, are not proven, do not directly resolve issues, and may lack finality.</li> </ul> </li> </ul>

***Federal and Indian Reserved Water Rights:  
Alternative Processes  
Work Sheet #6***

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
<p>(A) Endorse the same Alternatives Recommended by the Task Force at the May meeting on the general topic of Historic Claims Disputes and General Adjudications:</p> <ol style="list-style-type: none"> <li>1. Ecology Develops Comprehensive Background Info Early; Submits Early Report to Court</li> <li>2. Authorize Limited Special Adjudications</li> <li>3. Expand use of Mediation</li> <li>4. Create Specialized Water Court</li> <li>5. Authorize Pre -filed Written Testimony</li> </ol>		<p>Use of limited special adjudications may prevent jurisdiction over U.S. &amp; tribes because of McCarran Amendment.</p> <p><b>10 VOTES</b></p>	<b>#3</b>
<p>(B) Retain existing structure (general superior court adjudications) but create special incentives to encourage settlements of federal and Indian water rights</p>	<p>Incentives might include:</p> <ul style="list-style-type: none"> <li>• Reduced fees for participants who resolve claims early;</li> <li>• Special funds available for water conservation or delivery projects for participants who participate in settlements and/or resolve claims early;</li> <li>• Funding for mediation services.</li> </ul>	<p><b>12 VOTES</b></p>	<b>#2</b>

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
(C) Retain existing structure (general superior court adjudications) but mandate settlement/mediation efforts for any federal or Indian water right claims		<b>0 VOTES</b>	<b>NO RANKING</b>
(D) Create State Office like Montana's Compact Commission charged with task of negotiating with other sovereigns (United States & Tribes); negotiations may occur outside of any general adjudication	<p>Need to decide how any settlement will be "formalized"; options:</p> <ul style="list-style-type: none"> <li>• after settlement reached, legislative authorities (Federal, Tribal, and State as appropriate) take action to formalize agreement</li> <li>• settlement filed in federal court as consent decree; would need to address opportunities for notice, comment, objection by non-parties</li> </ul>	<b>4 VOTES</b>	<b>#5</b>
(E) Create State Office like Montana's Compact Commission charged with task of negotiating with other sovereigns (United States & Tribes); negotiations may only occur in conjunction with a general adjudication		<p><b>6 VOTES</b></p> <p><b>After voting, the Task Force decided to combine D &amp; E to allow the use of the compact commission in both scenarios (whenever adjudication is underway and when an adjudication is not underway)</b></p>	<b>#4</b>

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
<b>(F) Create new process designed to facilitate resolution of federal and tribal water right claims</b>	<p>Define scope of negotiations:</p> <ul style="list-style-type: none"> <li>• final confirmation (quantification) of reserved rights; or</li> <li>• final determination of tribal claim to instream flow; or</li> <li>• interim determination of reserved rights or instream flow claim; or</li> <li>• specify terms for managing water resources in basin subject to both federal and/or tribal AND state-based claims; or</li> <li>• parties determine scope of negotiations at outset</li> </ul>	<b>0 VOTES</b>	<b>NO RANKING</b>
<b>(G) Authorize (but don't mandate) watershed planning groups to take actions that address federal and/or Indian water right claims</b>	<p>Decide whether authority would be:</p> <ul style="list-style-type: none"> <li>• to facilitate development or implementation of water management plans, contracts, or compacts designed to satisfy federal and Indian claims but which do not directly settle them; or</li> <li>• to facilitate development of interim measures designed to satisfy federal and/or Indian water needs; or</li> <li>• to facilitate formal settlement.</li> </ul>	<p><b>RCW 90.82 (Watershed Planning Act) currently does not define tribal interests as including off-reservation, usual and accustomed (U&amp;A) rights.</b></p> <p><b>0 VOTES</b></p>	<b>NO RANKING</b>

## FEDERAL AND INDIAN RESERVED WATER RIGHTS: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, **REVISED** October 2003, Work Sheet #6

Alternatives	Description	Comments	Ranking
(H) Initiate government to government discussions with tribes and federal government to receive input from tribes and federal government on what process(es) they want the state to utilize to address their water rights claim.	This postpones making a decision on a specific process but acknowledges that a decision on new process(es) should not be made until the tribes and federal government are formally consulted with.	<b>14 VOTES</b>	<b>#1</b>
		<b>Eliminated by Task Force before voting on 9/30/03.</b>	<b>N/A</b>



***Instream Flow Disputes***  
***Work Sheet #7***

## INSTREAM FLOW DISPUTES

Water Rights Disputes Task Force, October 2003, Work Sheet #7

Instream Flow Disputes	Existing Processes: Watershed Planning; Superior Court APA Rule Challenges; PCHB challenges to individual Ecology water right decision; for tribal stream flow claims: General Adjudication or Federal Court Action	Strengths of the Existing Processes	Weaknesses of Existing Processes
<p>These disputes <b>may</b> involve issues surrounding (a) establishing instream flows; (b) challenging instream flows once they are established; and (c) protecting instream flows from impairment by junior rights.</p> <p>Pursuant to several water statutes, Ecology is charged with establishing instream flows by regulation. <i>See</i> RCW 90.22; 90.54. Watershed planning groups may recommend instream flows, which are submitted to Ecology to go through the rulemaking process. RCW 90.82.080.</p> <p>Once established by rule, an instream flow is an “appropriation” of water with a priority date of the date of rule adoption. Any new water rights granted after the rule is adopted are junior to the instream flow rule.</p> <p>Instream flow conditions may also be included in an individual water right decision, <i>e.g.</i>, as a condition of a water right permit or change decision.</p> <p>When a treaty secures a “right to take fish at all usual and accustomed places,” tribes have claimed rights to minimum stream flows based on the principle that the right to take fish carries with it the right to have fish habitat protected from human caused degradation, including water diversions. Where such a right is confirmed to exist, it is likely to have “senior” priority.</p>	<p>A person may challenge an instream flow adopted by rule by filing an APA rule challenge in superior court. Rules are reviewed on the agency’s record, RCW 34.05.558, and are overturned if the court finds: the rule violates constitutional provisions, the rule exceeds statutory authority, the rule was adopted without compliance with statutory rule-making procedures, or the rule is arbitrary and capricious. 34.05.570 (2)(c). Instream flows are set to protect instream values, including: wildlife, fish, scenic, aesthetic, water quality, other environmental values, and navigational values.</p> <p>An instream flow rule adopted by Ecology based on a recommendation from a watershed planning group is subject to APA challenge as would any other flow rule, but one would expect fewer challenges if all affected interests have participated in the recommendation.</p> <p>Decisions establishing a permit-specific flow condition can be challenged in an appeal to the Pollution Control Hearings Board.</p> <p>In order to formally resolve issues involving a tribe’s claimed right to a minimum stream flow for the protection of fish, the state must either initiate a general adjudication or one of the parties must bring an action in federal court.</p> <p>Under <i>Rettkowski</i> (“Sinking Creek”), 122 Wn.2d 219 (1993) the state may lack authority to prevent impairment of instream flow rights from junior rights in unadjudicated basins in certain circumstances.</p>	<ul style="list-style-type: none"> <li>For strengths related to the general adjudication process, see Worksheet # 1, Revised June 2003 (certainty, local forum, draws on agency expertise).</li> <li>For strengths related to the Ecology/PCHB process, <i>see</i> Worksheet # 3, Revised August 2003 (<i>e.g.</i>, expertise, statewide consistency, procedural and mediation services)</li> <li>Of the instream flow rules that have been adopted recently, very few have been challenged in court.</li> <li>APA rulemaking challenges are filed in superior court (which provides a local, court forum) and subject to record review (allowing some deference to agency and relatively prompt decisions).</li> <li>Watershed planning is underway, with flow recommendations for 18 basins due to Ecology between now and the end of 2005. Should this relatively new process be given an opportunity to succeed before it is changed?</li> <li>Confirming a tribal right to a particular stream flow is likely to confirm a relatively “senior” right – allowing better protection of the instream flow.</li> </ul> <p>Options recommended at September meeting for addressing federal and tribal water rights might provide some relief here, <i>i.e.</i>, those new options combined with existing processes may address instream flow disputes.</p>	<ul style="list-style-type: none"> <li>For weaknesses related to the general adjudication process, see Worksheet # 1, Revised June 2003 (costly/time-consuming, claimants may have too many opportunities to prove their case, all claims in entire basin must be addressed, no mandatory mediation, process can be too complex for unsophisticated claimants, does not facilitate the building or the transfer of expertise to other cases).</li> <li>For weaknesses related to Ecology/PCHB process, see Worksheet # 3, Revised August 2003 (<i>e.g.</i>, PCHB not local, court review limited)</li> <li>APA rulemaking challenges generally do not allow the taking of new evidence and do not contemplate live testimony. Superior courts may be viewed as lacking sufficient expertise to address instream flow issues.</li> <li>Confirming a tribal right to a particular stream flow is likely to confirm a relatively “senior” right, but the process for confirming such a right is contentious and may be time consuming. If the right is confirmed through a new method that does not involve a general adjudication, the issue of protecting the right (<i>Sinking Creek</i>) remains.</li> </ul>

***Instream Flow Disputes:  
Alternative Processes  
Work Sheet #8***

## INSTREAM FLOW DISPUTES: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, October 2003, **SECOND REVISED** Work Sheet #8

<p><i>For establishing instream flows, designate a new entity to establish the instream flow or designate a new entity to make instream flow recommendation to Ecology.</i></p>	<p><i>The entity could be:</i></p> <ul style="list-style-type: none"> <li>• <i>Washington State Department of Fish &amp; Wildlife; or</i></li> <li>• <i>Legislatively-created or governor-appointed science panel; or</i></li> <li>• <i>Legislatively-designated or governor-appointed representatives of impacted interests (e.g., tribes, federal government, local governments, etc.)</i></li> <li>• <i>Other?</i></li> </ul> <p>Task Force agreed not to address issues related to establishing instream flows as part of its recommendations.</p>	
Alternatives	Description	Ranking
<p>(A) To confirm tribal right to instream flow, endorse one or more of the options selected at the September meeting.</p>	<p>Options selected in September:</p> <p>After consultation with tribes and federal government:</p> <ul style="list-style-type: none"> <li>• improve adjudications; create Specialized Water Court;</li> <li>• retain existing structure but create incentives that facilitate settlements;</li> <li>• use entity like compact commission.</li> </ul> <p>Task Force revised summary of September decisions and then agreed not to address tribal issues related to instream flows separately from general tribal water issues.</p>	<p>Not Rated</p>
<p>(B) For challenging instream flow rules (once established), modify process for challenge – challenge still occurs in superior court but review could involve taking of new evidence and/or court substituting its judgment for that of the agency.</p>	<p>This would mean court would make decision independent from Ecology's decision.</p>	<p><b>1 VOTE</b></p>

## INSTREAM FLOW DISPUTES: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, October 2003, **SECOND REVISED** Work Sheet #8

Alternatives	Description	Comments	Ranking
(C) For challenging instream flows (once established), modify process for challenge – challenge is brought in Specialized Water Court.	This alternative was modified before voting to be identical to Option B, but action heard by Specialized Water Court.		2 VOTES
(D) For challenging instream flows, maintain status quo – rule is subject to challenge pursuant to APA in Superior Court (or Specialized Water Court if one is created).	APA Standards retained.		9 VOTES
(E) To protect instream flows from impairment by junior rights, authorize administrative action by Ecology.	This option applies only to flows based on senior trust rights located in adjudicated basins.		4 VOTES

## INSTREAM FLOW DISPUTES: ALTERNATIVE PROCESSES

Water Rights Disputes Task Force, October 2003, **SECOND REVISED** Work Sheet #8

Alternatives	Description	Comments	Ranking
(F) To protect instream flows from impairment by junior rights, authorize Ecology to petition the superior court (or the Specialized Water Court).	This option applies only to flows based on senior trust rights in unadjudicated basins.		8 VOTES
(G)			